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DECISIONS

OF

THE DEPARTMENT OF THE INTERIOR

IN

APPEALED PENSION AND BOUNTY-LAND CLAIMS;

ALSO

**A TABLE OF CASES REPORTED, CITED, OVERRULED,
AND MODIFIED,**

AND OF

STATUTES CITED AND CONSTRUED.

VOLUME X.

Edited by **JOHN W. BIXLER,**
FIRST VICE-CHAIRMAN OF THE BOARD OF PENSION APPEALS.

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DECISIONS RELATING TO PENSIONS.

MARRIAGE AND DIVORCE—NUNC PRO TUNC DECREE.

ISABEL W. SILER (WIDOW).

Claimant and soldier were married on the 29th day of May, 1881. Claimant was divorced from her former husband April 8, 1881. Soldier had been previously married, but in a proceeding for a divorce from his former wife the records of the circuit court of Cook County, Ill., show that on the 28th day of May, 1881, the case was heard by the judge of said court, and a decree of divorce ordered, and a formal decree was spread upon the records; it further appears that soldier's attorney in said suit subsequently informed him that a final decree could not be entered until soldier paid the stenographer for transcribing his notes of the evidence taken in said suit and a balance due said attorney; said soldier paid said charges, whereupon said attorney presented, on July 14, 1881, to the judge of said court a decree in nearly the identical language as the decree formerly spread on the records of said court, which said judge signed, and the same was also spread on the records. It is

Held, That said soldier was legally divorced from his former wife on the day said cause was tried and determined, and not on the date of entering said subsequent decree, and that his marriage to claimant was valid.

Assistant Secretary Webster Davis to the Commissioner of Pensions, November 18, 1898.

Isabel W., widow of Joseph B. Siler, late private Company A, Fourteenth Indiana Infantry, appealed August 8, 1898, from the Bureau action of June 1, 1898, rejecting her widow's claim, No. 664459, filed October 23, 1897, under the act of June 27, 1890, on the ground that she was not the legal widow of soldier.

It is contended by claimant's attorney that she was legally married to soldier May 29, 1881; that at the time of her said marriage there was no legal impediment to a legal marriage; that her husband, the soldier, was divorced from his former wife on May 28, 1881; that conceding that the decree of divorce was not signed by the chancellor of said court until July 14, 1881, a valid common-law marriage is established, as she continued to cohabit with him as his wife in the State of Illinois from September, 1881, to the date of his death, October 6, 1897; that the issue of their marriage was one son, Charles Joseph Siler, born August 14, 1882; that if the ceremonial marriage was not originally legal, it became so by reason of continuous cohabitation subsequent to the

removal, by death or divorce, of any impediment that may have existed at the time of the first marriage; citing the cases of Mercy Lewis (5 P. D., 293) and John M. Rich (4 P. D., 234).

Soldier enlisted June 7, 1861, and was honorably discharged October 13, 1861, and died October 6, 1897.

He was married to claimant, the ceremony being performed by a clergyman at Niles, Mich., May 29, 1881, and the first question to be determined is the validity of this marriage.

Both claimant and soldier had been previously married, but claimant was divorced from her first husband, James M. Belnap, by proceedings had in the circuit court of Cook County, Ill., and concluded April 8, 1881, a decree of divorce, a vinculo matrimonii, being granted her on that date.

The case was specially examined, and the special examiner under date of May 25, 1898, reported as follows:

I examined all of the original papers on file in the circuit court pertaining to soldier's application for divorce from his first wife, Susan, and made copies of so much of such papers as I thought was necessary.

The copies, made exhibits herewith, of the evidence, and the caption of the decree of divorce, in the case of Joseph B. Siler *v.* Susan Siler, shows that such cause was tried on May 28, 1881.

From the testimony herewith and all the circumstances connected with the case, it is evident that soldier, believing himself divorced from his first wife May 28, 1881, married this claimant the following day, and had no intent whatever to commit a bigamous marriage with claimant.

Although the decree of divorce of soldier from his first wife was not entered of record until July 14, 1881, and the soldier did not thereafter remarry this claimant, he continued to live with claimant until he died, and it is evident from the testimony of soldier's attorney, C. A. Surine, that soldier believed himself to be this claimant's lawful husband, and all the facts in the case indicate that claimant thought herself to be soldier's lawful wife.

The following copy of the proceedings in the soldier's divorce suit are the "exhibits" referred to by the examiner:

In the circuit court of Cook County, May term, 1881.

STATE OF ILLINOIS, County of Cook, ss:

J. B. SILER *v.* SUSAN SILER

Certificate of evidence.

Be it remembered that on the trial of the above-entitled cause before the Hon. William H. Barnum, presiding as chancellor of said circuit court, on the 28th day of May, A. D. 1881, the same being one of the days of the May term of said court, the complainant to maintain the issues on his part introduces the following evidence:

J. B. SILER, the complainant, called as a witness on his own behalf, was duly sworn and testified as follows:

Direct examination by Mr. SURINE:

Q. You are the complainant, Mr. Siler?—A. Yes.

Q. When was you married to the defendant?—A. 26th of March, 1863.

(Here follows a long list of questions and answers.)

At a term of the circuit court held in and for the county of Cook, in the State of Illinois, at the court-house in the city of Chicago, on the Twenty-eighth day of May, in the year 1881.

Present, the Honorable William H. Barnum, circuit judge.

JOSEPH B. SILER }
v. } 37682. 2150. In chancery.
SUSAN SILER. }

This cause having come on to be heard upon the bill of complaint herein, the answer of the defendant thereto, the cross bill of the defendant herein, and the answer of the complainant thereto, and the court having heard the testimony of witnesses sworn and examined in open court, and having heard the arguments of counsel and being fully advised in the premises, and on consideration thereof, doth find all the material facts alleged in said complainant's bill are true and that the defendant has been guilty of desertion for a period of over two years. It is therefore ordered, adjudged, and decreed by the court that the marriage between the complainant and defendant be dissolved, and the same is hereby dissolved accordingly, and the parties are, and each of them is, freed from the obligations thereof.

It is further ordered, adjudged, and decreed by the court that the defendant have the care, custody, control, and education of said child, to wit, Clay Siler, without any interference on the part of the complainant until the further order of this court.

A transcript of further proceedings had in said cause, filed in the Pension Bureau October 29, 1897, is as follows:

UNITED STATES OF AMERICA, *State of Illinois, County of Cook, ss:*

Pleas before the Honorable William H. Barnum, one of the judges of the circuit court of Cook County, Illinois, at a term thereof begun and held at Chicago, in the court house, in said county and State, on the third Monday (being the twentieth day) of June, in the year of our Lord one thousand eight hundred and eighty-one, and of the independence of the United States the one hundred and fifth.

Present, Honorable William H. Barnum, one of the judges of the circuit court of Cook County, State of Illinois.

L. L. MILLS, *State's Attorney.*

O. S. MANN, *Sheriff.*

Attest:

JACOB GROSS, *Clerk.*

Be it remembered that, at the term aforesaid, to wit, on the fourteenth day of July, A. D. 1881, the following, among other proceedings, were had and entered of record in said court, to wit:

JOSEPH B. SILER }
v. } 37682. 2150. Bill.
SUSAN SILER. }

This cause having come on to be heard upon the bill of complaint herein, the answer of the defendant thereto, the cross bill of the defendant herein, and the answer of the complainant thereto, the court having heard the testimony of witnesses sworn and examined in open court, and having heard the arguments of counsel, and being fully advised in the premises, and on consideration thereof doth find that all the material facts alleged in the said complainant's bill are true, and that the defendant has been guilty of desertion for a period of over two years:

It is therefore ordered, adjudged, and decreed by the court that the marriage between the complainant and defendant be dissolved, and the same is hereby dissolved accordingly, and the parties are and each of them is freed from the obligations thereof.

It is further ordered, adjudged, and decreed by the court that the defendant have the care, custody, control, and education of said child, to wit, Clay Siler, without any interference on the part of the complainant until the further order of this court.

It appears that the decree of July 14, 1881, is almost an identical copy of the decree of May 28, 1881, and its existence is accounted for by Charles A. Surine, who testified before the special examiner May 19, 1898, as follows:

I am 46 years of age; my post-office address is Suite 907, Journal Building, 160 Washington street, Chicago, Ill.; occupation, lawyer. I was associated with George Sparling in the law business during 1881, and I remember during 1881 we made application for divorce for Joseph B. Siler from his wife, Susan. I, as clerk, wrote up all the papers in the case and had all consultations with said Joseph B. Siler with reference to his application for divorce, and I conducted the examination of Siler in court. I attended to the case from beginning to end, and remember the circumstances very well. With the original papers in case, which is known as General No. 37682 of the circuit court of Cook County, Ill., now before me, I state as follows: The said case was tried on May 28, 1881. Upon the hearing of the testimony the court ordered the complainant to take his decree. Thereupon this affiant (witness) ordered the stenographer who reported said case to write up certificate of evidence. That the said complainant, upon being informed by this affiant that the court had ordered a decree, left this affiant and remained away from this affiant until some time in the month of July, 1881, when affiant, on learning his address, notified him through the mail to call on affiant and pay affiant the balance due him for affiant's services, and to pay the stenographer for taking down and writing up the testimony taken in said case. That on the 14th day of July, 1881, the said Siler called on this affiant and manifested surprise when told by this affiant that a decree could not be entered until the court had a copy of the evidence taken in said cause filed with the decree. Thereupon the said Siler paid to affiant the expenses of said stenographer, and on that day I presented the decree to the judge who heard said cause, and on that day the judge had entered of record the decree of divorce.

I think the legal effect of this decree was to annul the marriage between Siler and his wife, Susan, on July 14, 1881; and it is my opinion that there was a legal marriage existing between said Mr. Siler and his present widow, Isabel W. Siler, at the date of his death.

I have since learned that on May 29, 1881, the said Joseph B. Siler married his present widow, Isabel W. Siler, and I am satisfied that at that time, May 28, 1881, he was of the opinion that all had been done that was to be done in getting his divorce, and I am satisfied he believed he was actually divorced on May 28, 1881, from what he told me when he called on me July 14, 1881, as when he called on me July 14, 1881, he told me he supposed he was divorced on May 28, 1881, as he heard the court tell him to take his decree at that time. He also told me on July 14, 1881, that he had remarried, as after having been told by the court to take his decree he supposed that was all there was of it. I then told him on July 14, 1881, that his marriage that he went through the ceremony of on May 29, 1881, with his present widow, would become legal and binding from the date of entering the decree, July 14, 1881. That the ceremony of marriage he went through on the 29th of May, 1881, cut no particular figure so long as his intent was to get married; that he had gone through the ceremony on May 29, 1881, under a misapprehension of facts, and that his marriage would be binding from and after July 14, 1881, and that it would not be necessary for him to go through another marriage ceremony.

I never met the present widow of Joseph B. Siler until after his death, but I met him occasionally after July, 1881, up to the time he died, and he always spoke of his wife and child whenever I met him, and I had every reason to believe he continued to live with his wife he married May 29, 1881, as long as I knew him thereafter, though I had not seen him for about a year prior to his death. On one occasion I met him with a child, a boy about 5 or 6 years of age, he referred to as his child. This was about seven years after I obtained his divorce for him from his wife Susan.

If a final decree was rendered at the May term of said court, a subsequent decree in the same cause at a subsequent term of court, which does not even assume to be amendatory of the first decree, could not affect the legal or marital status of the parties established by the first decree. Courts never permit a litigant to be prejudiced by the delay of the courts. The maxim is that "an act of the court shall prejudice no one," and where a case stands over for argument from term to term on account of the multiplicity of business in the court, or for judgment from the intricacy of the question the party ought not to be prejudiced by such delay, but should be permitted to enter up his judgment retrospectively to meet the justice of the case. (See *Brown's Legal Maxims*, 122-126; *Freeman on Judgment*, pars. 56 and 57, and note 1.)

While a judgment or decree is not admissible in evidence until it has been entered in the judgment book, it is, nevertheless, valid before such entry. The judgment or decree is what is duly ordered to be entered. (12 Eng. and Am. Ency., Law 71 and note 2.)

Soldier's case was completed by the submission of his evidence under the pleadings May 28, 1881, and if the chancellor then announced from the bench that the complainant would "take his decree," it would follow that soldier was then divorced. Had the chancellor or either of the parties died the next day, the decree would, when entered, relate back to May 28, 1881, if the delay was not caused by the neglect or mistake of the complainant. (See 12 Ency. of Law, 80 and 81.)

In this case, however, the decree appears to have been entered on May 28, 1881, and in all respects in as formal a manner as the decree of July 14, 1881, and while the later decree may have served the purpose of collecting the fees of the solicitor and the stenographer it appears to have served no other purpose.

Had the decree of May 28, 1881, contained the condition that complainant should first pay his solicitor and the stenographer's fees, such condition would, in the absence of statute, have been surplusage so far as it affected complainant's marital status. When a decree makes unauthorized or superfluous provisions those may be stricken out on motion. (See *Stewart on Marriage and Divorce*, par. 409.)

The Pension Bureau appears to have assumed that the last decree was the final decree, and that it was therefore impossible to prove a valid common-law marriage, for the reason that the ceremonial marriage was void, soldier being at that time, May 29, 1881, undivorced, and the case of *Cartwright v. McGowan* (121 Ill., 388), copied in 6 P. D., 96, is cited in support of the Bureau action. The difficulty with that decision is, that the court appears to have failed to consider the presumptions of innocence in support of a ceremonial marriage. The decision in *Cartwright v. McGowan* (121 Ill., 388) was in effect overruled in part by the supreme court of Illinois in the case of the *Coal Run Coal Company v. Jones* (127 Ill., 379), wherein it was held that a second marriage being shown in fact, the law raises a strong presumption in favor of its legality, which was not overcome by mere proof of a former marriage,

and that the first wife had not been divorced. The court in discussing that case say:

The husband might have obtained such divorce, and left him free to contract the second marriage.

The same doctrine was announced in the case of *Harris v. Harris* (8 Bradwell, Ill., App., 57), and was affirmed by the Illinois supreme court in the case of *Johnson v. Johnson* (114 Ill., 611). See also the case of *Josephine Lake*, claim No. 533,667, decided June 20, 1895 (177 P. L. B., 74); *Cole v. Cole* (153 Ill., 585, and note); *Schmisseur v. Beatrice* (147 Ill., 210).

In the case under consideration a ceremonial marriage is shown, and the evidence shows that the parties continued to live together as man and wife in the State of Illinois from the time of their marriage to the date of soldier's death.

I am of the opinion that the evidence in this case shows that soldier was divorced from his first wife prior to his marriage to claimant, and that she is his widow. It becomes unnecessary to discuss the question of a common-law marriage.

The action appealed from is reversed, and the papers in the case are herewith returned.

EVIDENCE PRESUMPTIONS—DEATH.

SOPHIA PEARSON (WIDOW).

The soldier deserted claimant in New York in 1846 and went to Missouri, where he married another woman, from whom he separated after a few years, and shortly afterwards left there and has not been heard from since. He is now, if living, about 82 years of age.

Held, That the facts do not warrant a presumption of death, as soldier's absence is not unexplained.

Secretary C. N. Bliss to the Commissioner of Pensions, October 7, 1898.

The claim of Sophia Pearson for pension under the act of July 27, 1892, as the widow of William Pearson, who served during the Florida (Indian) war as a private in Company C, Second United States Dragoons, was rejected by your Bureau in September, 1897, after a special examination, on the ground of the claimant's inability to prove that the said soldier was dead. From that action an appeal was filed in October, 1897.

It appears from the evidence that the soldier and the claimant were married in Louisiana in 1843, and subsequently lived in New York, and that he left her about 1846 and she has never heard from him directly since. It is shown, however, that he applied for a bounty-land warrant in November, 1850, at which time he was a resident of Boone County, Mo. Investigation by your Bureau has disclosed the fact that he married another woman in Missouri, and, after living with her a

few years, disappeared and has not been seen or heard of since by anyone in that locality. It is contended that the facts are sufficient to create a presumption of death.

The act of March 13, 1896, provides as follows:

That in considering claims filed under the pension laws the death of an enlisted man or officer shall be considered as sufficiently proved if satisfactory evidence is produced establishing the fact of the continued and unexplained absence of such enlisted man or officer from his home and family for a period of seven years, during which period no intelligence of his existence shall have been received. And any pension granted under this act shall cease upon proof that such officer or enlisted man is still living.

Where a man is shown to have deliberately deserted his home and family and to have gone into another State and established a new home and domestic relations, it can not be said that his absence is "unexplained." His failure to return to his deserted wife or to communicate with her affords no ground whatever for presuming his death. And if he thereafter abandons his new home, and the new wife receives no intelligence of his existence for a period of seven years or more, still no inference as to his death can arise from that fact alone, since his relations with her were illicit and it is not to be presumed that he would have continued them if living. He might disappear under such circumstances as to create a presumption of his death, but in that case the presumption would arise from all the circumstances attending his disappearance and not merely from long-continued absence. In the case now under consideration there is no proof of any facts connected with the soldier's disappearance from his last-known place of residence in Missouri which would warrant a presumption of his death. He had separated from the woman he married there, and had no property interests to hinder him from leaving. He simply went away, and the place which had known him for a few years knew him no more. He was an Irishman by birth. Nothing is known of his family or of his history prior to his marriage to the claimant. She had known him only six months when she married him. The evidence shows him to have been a man of roving disposition and dissipated habits. If living, he would now be about 82 years old.

The law has not fixed any limit at which the presumption of life will cease. It has been held, however, that the extreme age of 100 years will not warrant a conclusive presumption of death (*Burney v. Ball*, 24 Ga., 505); nor infirm health and 80 years (*Matter of Hall*, 1 Wall, jr., 85).

After careful consideration I am of the opinion that the action of your Bureau in the premises was correct, and the same is, therefore, affirmed.

SERVICE—MISSOURI MILITIA—ACT JUNE 27, 1890.

MARTHA PATTERSON (WIDOW).

Claimant's husband was a member of the Missouri Six Months' Militia, which organization was never in the United States service, and she has, therefore, no pensionable status under the act of June 27, 1890.

*First Assistant Secretary Thomas Ryan to the Commissioner of Pensions,
October 17, 1898.*

The appellant herein, Martha, widow of Hezekiah Patterson, formerly a corporal in Company I, Fifth Missouri State Militia Infantry, Fagg's regiment, filed her application under the act of June 27, 1890, on January 4, 1896. The claim was rejected on October 13, 1897, on the ground that soldier was never in the United States service, and appeal was filed on October 28, 1897, in which it is contended that the rejection for cause stated is contrary to the law.

The records show the soldier in question to have enlisted on September 26, 1861, and to have been relieved from duty on February 4, 1862, his services being in Company I, Fifth, or Fagg's, Regiment Missouri State Militia. The nomenclature of various Missouri military organizations was considerably confounded, especially during the early part of the civil war, but there seems to be no doubt as to the service of this soldier, neither is there, on investigation, regarding the status of the regiment of which he was a member.

Previous to December, 1861, there were but two regular State military organizations in the State of Missouri favorable to the Federal cause. The first of these, the Three Months' Volunteers, were organized under the authorization of President Lincoln, through Captain Lyon, then in command of the St. Louis arsenal. The enrollment of these volunteers commenced as soon as practicable after April 15, 1861, ten regiments being rapidly formed, which were immediately mustered into the Federal service and became a component part of the Federal Army. Claimant's name is not found among these three months' volunteers, and the date of his enlistment and being relieved from duty precludes the possibility of his being in any of the ten regiments. The second of the military organizations referred to came into existence under an order issued by H. R. Gamble on August 24, 1861, calling for 42,000 men for the purpose of maintaining the power of the Federal Government; said Gamble being at the head of the provisional government of the State of Missouri, which had overthrown the regular State government which espoused the cause of secession and was represented by Governor Jackson. While many of the organizations formed under this order had a variety of names, yet they were properly and officially grouped together and known as the Six Months' Militia. It is to one of the regiments which made up the Six Months' Militia that claimant must have belonged, for he was not, as shown, a

three months' volunteer, and there was no other State organization formed in Missouri (save the Six Months' Militia) until December, 1861, when the Missouri State Militia came into existence. It is noticeable, in this connection, that soldier stated, in a declaration filed by him, that he was not formally discharged, but his "regiment was disbanded by one Gamble, the discharging officer."

It being concluded that soldier was a member of the Six Months' Militia, it remains only to discover the status of said militia in relation to "the military or naval service of the United States."

The status of the Six Months' Militia, as well as that of the other various State military organizations, in the State of Missouri, was elaborately discussed in the case of James L. Hicks (8 P. D., 518), and exhaustive reasons given for the holdings therein, said opinion stating "The Six Months' Militia are not pensionable under any existing law." The reasons for such holding is based upon the finding, as a fact that—

The organizations formed under this order were called the Six Months' Militia, and were organized wholly for the purpose of State defense. They were never called into the service by the President, never acted under orders of an officer of the United States, and, consequently, the members of such Six Months' Militia do not fall within section 4693 of the Revised Statutes.

The legality of such holding is unquestionable. All reference is hereby made to the said case of James L. Hicks.

The soldier not having been in the service of the United States, the widow has no status.

The action appealed from is affirmed.

DEPENDENCE ACT JUNE 27, 1890—WIDOWS.

RHODA A. GASS (WIDOW).

1. It is not the income alone of which a widow is in receipt but it is all of the resources possessed by her from which a support may be derived, save that of her daily labor, which must be the basis of judgment as to her dependency within the meaning of the act of June 27, 1890; and a claimant for widow's pension under said act who, at the time of filing her claim, owned, in fee simple, 60 acres of land, unencumbered, of the value of \$2,000, together with the use, during her natural life, of 80 acres, assessed at \$2,300, is not pensionable. The law does not take into consideration either a comfortable or adequate support.
2. The act of June 27, 1890, pensions for a condition existing at the date the widow filed her application, and the proof must go to the facts as they existed at that time.

*First Assistant Secretary Thomas Ryan to the Commissioner of Pensions,
October 17, 1898.*

On January 19, 1891, the appellant herein, Rhoda A., widow of Samuel N. Gass, formerly a private in Company B, Thirtieth Michigan Volunteer Infantry, filed her application under the act of June 27, 1890. Claim was rejected on June 30, 1897, on the ground that the widow was

not dependent within the meaning of said act, and the appeal filed on October 27, 1897, contends that the action was contrary to the law under the evidence.

Soldier died intestate on November 9, 1881, leaving property, both real and personal. A special examination was held in the case, and although a copy of the administrator's settlement of the estate was taken, yet there is no date given whereby it could be even presumed when the settlement occurred. The statutes of the State of Michigan have undergone a considerable change since the date of soldier's death regarding the succession of title to real estate, and although such changes may have affected the partition of the estate in question, it is nevertheless shown that on the date of the filing of the application herein claimant was possessed of, in her own right and unencumbered, a parcel of farm land containing 60 acres, which was assessed at a valuation of \$2,000. In addition to this, she had set off to her by the probate court the sole use for her natural life of another parcel of farm land, which was assessed at a valuation of \$2,400. All of this property appears to have been the home of soldier and claimant; but after soldier's death the widow did not continue to reside there, but rented it out on shares, and a strenuous effort was made by the special examiner to discover, by cross-examining the claimant and her various tenants, the actual income derived from the real estate. The endeavor was only partially successful, but I do not apprehend, as other facts stand in the case, that the information sought was especially important or desirable. The question is not always one of actual income, neither is it always one of an actual principal sum. One might be possessed of real estate worth \$50,000 from which no income was received, or one might have a principal sum (or its equivalent) of \$1,000 which by force of circumstances yielded an income or its equivalent of \$300 yearly. In neither of the cases would a claiming widow fall within the benefits of the act of June 27, 1890. It is the means of support—that is, the resources from which a support may obtained—that must constitute the basis of judgment. The resource may be a principal sum or its equivalent, it may be an income or the use of something capable of producing an income or it may be all these combined.

In the case at bar the claimant holds the fee simple to a piece of land worth \$2,000, and this fact of itself practically places her beyond the benefits of the act invoked; but she has, in addition to this principal sum, the income which may be derived from a larger and more valuable parcel of land, and the right of this income is hers by virtue of law during her natural life. This, then, is a case wherein it is shown that the means of support available to and actually belonging to claimant, consisting of the equivalent to a principal sum, together with the use of a parcel of land capable of producing an income, places the claimant outside of the benefits of the act of June 27, 1890. Had she only the life use of the 80 acres, then it would not only be proper but abso-

lutely necessary to show what income might be derived from her holding. But such, as has been shown, is not the case, and I can not see, under the facts as they are presented, that the pensionable status of claimant would be changed even if she chose to manage her property in such a way as to cut her off from all income therefrom, provided her principal sum did not diminish and her right to the use of the other parcel of land was not infringed.

Much of the appeal is devoted to a discussion of the fact that since the date of the filing of the application herein the pecuniary condition of the claimant has changed; and it is impossible to review the case without being impressed by the fact that much time was spent at the special examination herein in going into great detail regarding claimant's pecuniary condition, as it was a considerable length of time after the filing of the application. Such inquiry, however, is entirely foreign to the issue, and the data brought out, although very carefully gathered and summarized, is wholly irrelevant and immaterial. That her income from both parcels of land seems to have been gradually diminishing since 1891 by reason of the wear and tear of the property as well as by the character of her tenants, may be admitted; but it is not with such facts that we have to do.

The third section of the act of June 27, 1890, pensions a condition that exists at the time of the filing of the application and at no other. The truth of this statement is apparent upon a reading of said section, which makes it incumbent, as a condition precedent, to show that the widow was left without other means of support than her daily labor. Where such fact is shown, then the pension shall be allowed (other terms of the act having been fulfilled), and shall commence, not at the date such condition was shown to have existed, but at the date she filed her application. In other words, a widow alleges that at a certain date she was without other means of support than her daily labor, and the proof must go to the facts as they existed at the date she alleges they did exist, and not to a time materially previous to or after said date.

It should be stated that the evidence is silent as to the relative productiveness of the parcels of land, but it is presumed, by the valuation of the assessor, that it is about the same.

One other point is worthy of notice. The claimant contends that her property will not adequately support her, and the special examiner states that the income derived, although variable, would not comfortably support claimant. The law does not take into consideration either a comfortable or adequate support. Adequate and comfortable are very variable terms when applied to one's support, and there is no warrant for allowing such words to be injected into the act or to construe said act in a manner which would be equivalent to such a reading.

Lacking means of support save that of her daily labor, the widow is entitled to the pension granted under said act. If this condition precedent is not shown, the act can not be successfully invoked.

The action appealed from is affirmed.

MARRIAGE—WIDOW'S PENSION—ACT MARCH 19, 1886.

WILHELMINA K. MONTETON (WIDOW).

As claimant was married to soldier subsequent to the passage of the act of March 19, 1886, viz, on September 4, 1891, the allowance of the rate of \$8 was proper. The fact that appellant had a meretricious relation with the soldier prior to the passage of said act does not entitle her to the rate of \$12 per month.

First Assistant Secretary Thomas Ryan to the Commissioner of Pensions, October 21, 1898.

Wilhelmina K. Monteton, of Chicago, Ill., October 30, 1897, entered an appeal from the action of the Bureau in her claim for a widow's pension under the general law.

The soldier served in Company I, Fifth United States Cavalry, from September 4, 1876, to March 24, 1877. He died August 9, 1896.

The appellant, August 19, 1896, filed a declaration for a widow's pension under the general law. Certificate issued to allow pension at \$8 per month from time of the soldier's death. On this appeal it is contended that the rate of \$12 per month should be allowed, as the soldier and claimant were married prior to March 19, 1886. On that date an act was approved providing the rate of \$8 per month to such widows as were subsequently married to soldiers on account of whose service and death their title to pension is based.

The certificate of marriage filed in the case shows that claimant and soldier were married September 4, 1891. The claimant had been the wife of one Frederick Kapitzki; she left him prior to 1880 on account of his drunkenness, and commenced living with the soldier, by whom she had a child December 24, 1881. She obtained a divorce from Kapitzki on the 13th day of October, 1882. So far as appears the union between the claimant and soldier was willfully meretricious until they were married in 1891. There is some evidence to the effect that they lived as husband and wife from 1880 until the soldier's death. Such testimony is hardly necessary, as the births of their children sufficiently attest that fact. Thus far there is nothing indicating any change in their relations until they were married, September 4, 1891; there is no evidence whatever tending to show that claimant and soldier were husband and wife prior to that date, certainly not prior to March 19, 1886. Therefore the action of the Bureau in allowing claimant pension under the general law at \$8 per month was proper and is affirmed.

PRACTICE—RATES—DISABILITY.

CHAUNCEY DAVIS.

1. Rule 6 of the second division of the rules of practice was never intended to apply, except in cases of such errors of rating as were patent upon their face, and which would naturally be corrected by the Commissioner of Pensions upon his attention being called to such errors; but where the determination of a rate is the result of judgment on the evidence, and not merely the result of a clerical mistake, the rule has no application.

2. As the medical examinations show no appreciable disability, a rate of \$6 per month is adequate under the act of June 27, 1890, though claimant is 60 years of age and his system is relaxing by reason thereof.

First Assistant Secretary Thomas Ryan to the Commissioner of Pensions, October 17, 1898.

On August 20, 1894, and June 10, 1896, the appellant herein, Chauncey Davis, formerly a corporal in Company A, Eighty-eighth Pennsylvania Volunteer Infantry, filed his declarations under the act of June 27, 1890, alleging a variety of disabling causes. Claim was admitted on January 12, 1897, at the minimum rating on account of senile debility, and the appeal herein, filed on October 27, 1897, contends that the evidence shows claimant entitled to the maximum rating.

The medical examination of claimant, held on August 19, 1896, shows him to be 60 years of age, 5 feet and 8 inches in height, and 155 pounds in weight. He had slight crepitation in both shoulder joints, the action of the heart was somewhat rapid, and he was slightly deaf in both ears. While his several actual disabilities were of slight degree, yet he presented the appearance and gave indications of being one whose system was relaxing by reason of advancing years.

It is believed that a \$6 rating for senile debility is proper and commensurate with the degree of disability shown in this case, and the said rating having been allowed it is sustained.

My attention has been called to the fact that it appears to be an open question, under the decision regarding the relation of this case to Rule 6, Rules of Practice, before the Commissioner of Pensions, whether or not the appeal in this case should be dismissed.

Without doubt, under the holding in the case of Jacob Oiler (7 P. D., 411), and under a portion of the holding in the case of George A. Brown, (8 P. D., 309), which followed the ruling in the Oiler case, the within appeal should be dismissed. This practice of thus dismissing appeals obtained for some little time, but it was overturned by the holding in the case of Charles Yokel (8 P. D., 31), wherein it was distinctly stated that said Rule 6

was never intended to apply, except in cases of such errors of rating as were patent upon their face and which would naturally be corrected by the Commissioner of Pensions upon his attention being called to the error. Where the determination of the rate is a result of judgment on the evidence, and not merely the result of a clerical mistake, the rule has no application and was not designed to apply.

I conceive the holding in the Yokel case to be the true interpretation of the rule in question, and the holding in said case, so far as it has to do with this issue, is reaffirmed. The holding in the Oiler case, *supra*, and that part of the holding in the Brown case, *supra*, which is contrary to the ruling in the Yokel case, are hereby overruled.

The action appealed from is affirmed.

DISCHARGE—SERVICE—ACT OF JUNE 27, 1890.

ROSA RUPP (WIDOW).

The soldier having been dishonorably discharged from the service in the war of the rebellion, his widow has no title to pension under section 3 of the act of June 27, 1890.

Secretary C. N. Bliss to the Commissioner of Pensions, October 29, 1898.

Appellant's claim for pension under the act of June 27, 1890, as the widow of Joseph Rupp, late of Company I, Twentieth New York Volunteer Infantry, filed November 11, 1895, was rejected April 3, 1896, upon the ground that her husband was not honorably discharged from his military service during the war of the rebellion.

From this action an appeal was entered May 7, 1897.

The soldier was married to the claimant January 17, 1864, and died October 15, 1895.

The War Department, under date of February 5, 1895, reported as follows:

Joseph Rupp, Company I, Twentieth Regiment New York Infantry, was enrolled May 3, 1861, and dishonorably discharged May 6, 1863. From enrollment to discharge he held the rank of private and corporal, and during that period the rolls show him present, except as follows:

August 31, 1861, on detached service with an expedition since August 26, 1861. April 30, 1863, absent, confined. This man was tried by a general court-martial on the charge of mutiny and misbehavior before the enemy; he was found guilty, and sentenced "to forfeit all pay, bounties, and allowances, which are or may become due him; to be dismissed from the service of the United States with a dishonorable discharge, then to be confined at hard labor, in charge of the guard, during the remainder of the war, at such place as the proper authorities may direct."

The sentence was approved and promulgated in General Orders, No. 24, Headquarters of Second Division, Sixth Corps, dated May 6, 1863.

The unexecuted portion of the sentence was remitted by paragraph 12, Special Orders, No. 360, War Department, Adjutant-General's Office, dated August 13, 1863.

Special Order, No. 152, War Department, Adjutant-General's Office, of April 4, 1866, directed that the proceedings, findings, and sentence of the general court-martial be set aside; that the soldier be restored to duty, and that upon application to the chief mustering officer at Albany, N. Y., he be honorably mustered out of the service of the United States, to date from June 1, 1863, the date of muster out of his regiment.

It has been determined that the order (Special Order, No. 152), by which it was undertaken to set aside the proceedings and to substitute an honorable discharge for the already executed dishonorable discharge is inoperative, and that therefore this man was dishonorably discharged May 6, 1863, in accordance with the sentence of the general court-martial.

The question presented is as to the legal effect of Special Order, No. 152, above mentioned. It is conceded that this is a question to be determined by the War Department.

It having been held by that Department that the discharge, under the conditions set forth, was dishonorable, its decision is accepted as

final. So as the soldier, claimant's husband, upon whose service in the war of the rebellion, among other things, the appellant bases her title to pension, was not honorably discharged therefrom, pension under the act of June 27, 1890, must be denied her for that reason.

Should the appellant desire that the record as to her husband's service and discharge be reviewed, that the bar to title to pension in her case as here determined may be removed, she should address the War Department for that purpose.

Rejection affirmed.

MARRIAGE AND DIVORCE—IMPEDIMENT.

INDIANA CHRISTIE (ALLEGED WIDOW).

A marriage solemnized in the State of Virginia, when either of the parties had been previously married, said first marriage never having been dissolved, is void from inception. It necessarily follows that when the impediment is removed a new relation must be shown to have been entered into; for a continuance of cohabitation is but a continuance of an illicit relation upon which a common-law marriage can not be based. (*Stones v. Keeling*, 5 Call., 143, and *Herbert v. Hile's Admr.*, 90 Va., 390.)

Secretary C. N. Bliss to the Commissioner of Pensions, October 29, 1898.

The within motion for reconsideration was filed by attorney on October 26, 1897, seeking a review of the Departmental decision in this case, rendered on May 18, 1895, wherein it was held that the claimant, Indiana, was not the legal widow of James Christie, formerly a private in Company L, Eleventh Pennsylvania Cavalry, she having filed a declaration on April 29, 1893, under the act of June 27, 1890.

The facts as set out by the decision referred to show that Indiana Crawford, an unmarried woman, was married by ceremony to James Christie at Portsmouth, Va., on February 10, 1864. They remained in the State of Virginia for some time thereafter, eventually removing to the State of Pennsylvania, in which State they continued to reside until the death of the soldier at Philadelphia on April 6, 1893. They lived together continuously after the said marriage, fulfilling the relation toward one another of man and wife. They so held themselves out to the public, and were invariably recognized to be such.

It is admitted that before the date of the said marriage Christie had a wife living, and the records of the court of common pleas for Jefferson county, Pa., disclose that he was granted a divorce from said former wife on February 16, 1865, which date, it is noted, was a trifle over one year after the solemnization of this marriage with claimant. Under such a state of facts it was, and is still, contended that a valid common-law marriage sprang up, eo instanti, upon the granting of the divorce decree which removed the impediment existing at the time of the marriage of soldier and claimant.

This is a case which falls within the terms of section 2 of the act of August 7, 1882 (amending section 4702, Revised Statutes), which recites:

Marriages shall be proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time of marriage or at the time when the right of pension accrued.

The right of pension undoubtedly accrued to claimant in the State of Pennsylvania, and it is evident that if her marriage to Christie was valid, either in Pennsylvania or in Virginia, at the date it was celebrated, then she has a pensionable marriage status.

In *re* Hunt's appeal (86 Pa. Stat., 294) is the leading case in Pennsylvania upon the issue herein involved, and the rule is there laid down that—

A relation shown to have been illicit at its commencement is presumed to continue so until proof of change. Such a relation raises no presumption of marriage.

The court further held that before such a condition could be resolved into a marriage, proof must be made that a new relation or marriage contract was entered into subsequent to the removal, by death or divorce, of the impediment. (See Hunt's appeal, *supra*; Thomas v. Thomas, 124 Pa. Stat., 646; Sarah C. Hayden, 8 P. D., 364, and Louisa S. Hoepfner, 9 P. D., 497.)

It has not been pretended in the case at bar that any new relation was entered into after the decree of divorce of the former marriage was entered, but the parties continued to cohabit together as man and wife under the ceremonial marriage of February 10, 1864. There can be no question but that such a relation was illicit under the laws of the State of Pennsylvania and that the said marriage relation was illegal.

The Departmental decision in the case is reaffirmed.

Was the marriage valid in the State of Virginia in which State it was solemnized?

I am not aware that the Department has passed upon the question at issue so far as it relates to the law of Virginia, and I have examined the reports of the court of last resort in that State with a view of making a direct holding upon the matter.

I find that the issue was first raised in Virginia in the year 1804, in the case of *Stones v. Keeling* (5 Call, 143), the question being as to the legality of a second marriage, both parties to the first one being alive and no legal separation had. The court said:

I have no doubt upon the testimony but that both marriages were celebrated, and that the first existed at the time of the celebration of the last. The second marriage was therefore not lawful. It was even void. * * * In the case before us of a second marriage and void marriage, the second husband stands merely in the steps of a stranger.

An attempt was made in this case to draw a distinction between marriages that were "null," "voidable," and "void." The court held

that the words "null" and "void" were, in this particular, synonymous, and that the second marriage was not voidable, but void.

There appears to have been no further expression by the highest court in Virginia as to the said issue for a space of some eighty years. The question was, however, raised in 1894, in the case of *Heckert v. Hile's Administrator* (90 Va., 390). The issue was in regard to the legitimacy of children—the fruit of a second marriage—born when a former marriage had not been dissolved by law or death. Although the question was one of legitimacy under the statutes, the question of the legality of the second marriage was before the trial court, was passed upon, and went to the court of last resort on a writ of error. The court said:

The controversy in this case is between the children of Peter Hile by a lawful wife who left her husband and went into the State of Michigan, and the children of Peter Hile by another woman married by him during the lifetime of his first wife, who were born before the dissolution of marriage of the first wife. The circuit court decreed that the first marriage was lawful and the children legitimate; that the second marriage was null, but that the children were legitimate, made so by our statute. * * * There can be no doubt of the correctness of the decision.

The court cited the case of *Stones v. Keeling*, *supra*, as sufficient authority for the holding.

It is thus seen that the courts of the State of Virginia are in harmony with the courts of nearly all of the States of the Union in holding that such a marriage as is shown in the case at bar is not voidable, but void. This being true, it necessarily follows that when the impediment which makes the second marriage void is removed a new contract must be entered into. A continuance of cohabitation under such circumstances is but a continuance of an illicit relation, the effects of which are void from inception and so continue until a new and independent relation is established. As has been stated, it has not been pretended that any such new relation was entered into.

It must, then, be held, that so far as a pensionable marriage status is concerned, a valid marriage has not been shown to ever have existed between claimant and Christie in the State of Virginia.

The attorney cites, in his motion, "a recent decision" by the Department in support of his contentions. He does not give the title to the said decision, and I have no means of knowing to what he refers. I think, however, the omission immaterial. The law, so far as it relates to marriages in Pennsylvania, was laid down in the *Hayden Case*, *supra*, and was again stated in the holding in the *Hoepfuer Case*, *supra*. The law not having been heretofore laid down, so far as marriages are concerned, in the State of Virginia, I have applied it in the case at bar in conformance with what appears to be the law in that State, by reason of section 2 of the act of August 7, 1882 (amended section 4702, Revised Statutes).

The motion for reconsideration is overruled.

SERVICE—ACT JUNE 27, 1890.

CHARLES MCQUAY.

Claimant's enlistment being on January 9, 1866, it is incumbent upon him to prove, before he can be accorded a status under the act of June 27, 1890, that his service was in aiding the suppression of the forces of the Confederate army or navy. (Following the holdings in the cases of John Barleyoung, 7 P. D., 453, and Edward Farrell et al., 7 P. D., 532.)

Secretary C. N. Bliss to the Commissioner of Pensions, October 29, 1898.

The appellant herein, Charles McQuay, formerly a third-class apprentice, United States Navy, filed his declaration under the act of June 27, 1890, claim being rejected on September 27, 1894, on the ground that claimant's service was not during the war of the rebellion. An appeal, filed on November 6, 1897, contends that the rejection was contrary to law.

Claimant enlisted in the United States Navy at New London, Conn., on January 9, 1866, and was honorably discharged on July 22, 1869, having served on the U. S. S. *Sabine*, *Pawnee*, and *Guerriere*. The issue raised by the appeal is as to the date of the termination of the war of the rebellion, the attorney contending that said date has been fixed as of August 20, 1866, by the War Department, the Interior Department, and the Supreme Court of the United States.

This statement is true, but only partially so, and it is not a fact in the degree to which the attorney's words imply. The war of the rebellion did not legally terminate in all of the States at the same date, neither did it terminate at any one single date for all purposes. It is a well-known fact of history that the civil war practically came to an end in July, 1865. The only exception to this condition was a continuation of military hostilities in the State of Texas and acts of piracy by the Confederate privateer *Shenandoah*. The condition of affairs on July 1, 1865, is well stated in the holding in the case of Edward Farrell et al. (7 P. D., 532), where it is said:

Not only this, but the Confederate Government had ceased to be a government de facto. Its executive, judicial, and legislative branches had been dispersed. Its president a prisoner of war, its vice-president an applicant for pardon, its armies captured or dispersed, and its navy and privateers, with the single exception of the *Shenandoah*, either captured, destroyed, or surrendered.

Another feature which has some bearing upon the case at bar, claimant having enlisted in the United States Navy, lies in the fact that during the month of June, 1865, Great Britain withdrew her recognition hitherto accorded the Confederate States cruisers, and that on July 1, 1865, the proclamation of President Johnson went into effect, and the blockade, existing since April 27, 1861, was raised, and all of the ports on the entire seaboard of the United States were thrown open to foreign commerce. It has thus been held by the Department,

and it would seem properly so, that enlistments in the United States States Navy after July 1, 1865, were not enlistments in the war of the rebellion.

It may be well to state that the holding of the Supreme Court as to the fact that the legal termination of the civil war was August 20, 1866; that on that date President Johnson issued his proclamation stating that the war of the rebellion was at an end, said proclamation being necessary because the State of Texas was not finally subdued till that date. But this holding in no way intimates that the civil war was not terminated in all of the other States previous to that date, and, as a matter of fact, the civil war did terminate, except in the single instance of the State of Texas, over a year before the date claimed.

The issue raised herein, and its many collateral phases, was exhaustively discussed in the case of John Barleyoung (7 P. D., 453), and Edward Farrell et al (7 P. D., 532), to which reference is hereby made. In view of the holding in said cases, it is concluded that the enlistment at issue was not in the war of the rebellion, and in order for claimant to prove a pensionable status under the act of June 27, 1890, it is incumbent that he show that his service was in aiding the suppression of the rebellion in the State of Texas, or that it consisted of operations against the privateer *Shenandoah*. This last fact would, however, be impossible to prove, for the said privateer was surrendered on the 8th day of November, 1865, at Liverpool, England, two months prior to claimant's enlistment.

The action appealed from is affirmed.

SERVICE—MISSOURI MILITIA.

FREDERICK BRENNECKE.

The organization in which the claimant served was a purely State organization, which does not come within the terms of the joint resolution approved February 15, 1895, and whose members are not entitled to pension under either the act of June 27, 1890, or section 4722 of the Revised Statutes.

First Assistant Secretary Thomas Ryan to the Commissioner of Pensions, November 12, 1898.

The claim of Frederick Brennecke for pension under the act of June 27, 1890, was rejected by your Bureau in February, 1896, on the ground that the organization in which the claimant served was not in the service of the United States. From that action an appeal was taken November 3, 1897, the contention being that the organization to which the claimant belonged was part of the Provisional Missouri Militia, the members of which were, by a joint resolution approved February 15, 1895, declared to be included within the provisions of the act of June 27, 1890.

The claimant alleges that he was enrolled July 4, 1864, as a private in Company B, six months' Provisional Missouri Enrolled Militia, and was honorably discharged February 21, 1865. The War Department has no record of his service. The Auditor of the Treasury for the War Department reports that Frederick Brennecke was a private in Company B (Capt. Adolph Tacke), six months' Provisional Enrolled Missouri Militia, and that he was enrolled July 20, 1864, and continued in active service until February 21, 1865, when he was relieved from further duty.

It has been uniformly held by this Department that the Provisional Missouri Militia mentioned in section 4722 of the Revised Statutes and the joint resolution of February 15, 1895, included only what were known as the Provisional Regiments of Enrolled Missouri Militia which were organized in the early part of 1863, for more permanent and effective service than could be expected from ordinary militia organizations, and did not include the provisional companies of enrolled militia which were organized pursuant to General Order No. 107, dated June 28, 1864, "to meet the ends of local defense." (See Digest of Pension Laws and Decisions, pp. 308 and 309; also, the case of the widow of John H. Schuler, 8 P. D., 462; and the case of James L. Hicks, 8 P. D., 518.)

The pensionable status of the various militia organizations of the State of Missouri was very fully discussed in the decision rendered April 14, 1897, in the case of James L. Hicks (*supra*), who was a member of Capt. Thomas J. Babcock's Company, A, of the Miller County Provisional Enrolled Missouri Militia. In deciding adversely to this claim for pension under the act of June 27, 1890 the Assistant Secretary, John M. Reynolds, said:

It is necessary at the outset to note the sharp line of distinction to be drawn between what were known as Provisional Regiments of Enrolled Missouri Militia, and Provisional Companies of Enrolled Missouri Militia. The provisional regiments were made up as a "picked force" from the Enrolled Missouri Militia, and were organized by the State of Missouri as early as February, 1863, and they were for continuous active service so long as the emergency existed. Members of these provisional regiments are the ones referred to in section 4722, Revised Statutes, and are also included in the provisions of the act of February 15, 1895; but the provisional companies were entirely different organizations. These companies did not come into existence until June, 1864, and were purely State organizations, raised under General Order No. 107, from State military headquarters, to meet "the ends of local defense;" they were called out for local purposes and temporary service, and are clearly distinguished from the regiments which were for permanent and general service.

The organization in which the claimant, Bennecke, served was clearly one of the provisional companies organized under General Order No. 107, which, as heretofore stated, were purely State organizations, the members of which are not entitled to pension under any existing law.

The action of your Bureau is affirmed.

RATING-DISABILITY-COMPOUNDING RATES.

GEORGE A. SOUTH.

Unless specifically provided for, there is no provision of law by which disabilities can be considered separately and compounded so as to allow for all the pension which each, considered separately, would aggregate. It is the combined effect of all that must be considered; and in this case the combined effect of all the disabling causes accepted as due to the service not rendering claimant's incapacity to perform manual labor equivalent to the loss of a hand or a foot, he is not entitled to a higher rate of pension than he now enjoys (\$17 per month).

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
November 18, 1898.*

George A. South, late private Company D, Twentieth Ohio Infantry, appealed October 27, 1897, from the Bureau action of July 27, 1897, rejecting his increase claim, certificate No. 399554, filed September 12, 1896, under the old law, rating him seventeen-eighteenths for disability due to chronic diarrhea, piles, and disease of lungs, including disease of digestive organs and general debility, and holding that disease of heart was not accepted as a result of pensioned causes.

It is contended that claimant was entitled to third-grade rate, as the examining board of surgeons rated him on February 3, 1897, six-eighteenths for diarrhea, eight-eighteenths for piles, ten-eighteenths for disease of lungs, two-eighteenths for disease of digestive organs, the sum total of which is \$26.

Soldier enlisted September 10, 1861, and was discharged September 27, 1864. He was pensioned June 12, 1888, at \$6 per month from August 13, 1881, and \$8 per month from May 5, 1886, for disability resulting from chronic diarrhea, piles, and lung disease; which rate was increased to \$12 per month from August 28, 1889; \$14 from July 30, 1890; \$16 from August 12, 1891; and \$17 from May 6, 1896, which rate he is now receiving.

In his application for increase, filed September 12, 1896, he alleged, in addition to pensioned causes, resulting disease of digestive organs and heart and general debility.

When medically examined under this application, February 3, 1897, the board rated him as alleged by claimant, but they found no disease of heart and failed to indicate that claimant's disabilities were equivalent to the loss of a hand or a foot for the purposes of manual labor.

The law gives no authority for combining the rates for two or more causes so as to make an aggregate rate except in certain specific rates granted for certain conditions defined by the law, as held by Assistant Secretary Bussey in the case of Hiram H. G. Bradt (5 P. D., 282). The rate of pension must be based upon the combined effect of the several causes. See case of David Wilson (9 P. D., 404), decided July 15, 1898. This rule of practice has been uniform. See case of Abram McCullum (6 P. D., o. s., 111), decided by Acting Secretary Bell in 1879, and the

case of Henry McDougough (6 P. D., o. s., 475), decided by Secretary Schurz in 1880, and cited in Digest of Pension Decisions of 1897, page 407.

Subsequent to this appeal the case was again considered from a medical standpoint by the medical referee, who, on August 1, 1898, reported as follows:

The action of July 27, 1897, rejecting claim for increase under the general law, appears to have been proper and should be adhered to. Pensioner is now in receipt of \$17 per month on account of chronic diarrhea, piles, and disease of lungs.

Certificate of medical examination of February 3, 1897, made under the claim, does not describe a degree of disability resulting from pensioned causes equivalent to the loss of a hand or a foot for the purpose of manual labor, a degree of disability requisite to entitle to the next higher rate of third grade.

Disease of heart alleged as a result of pensioned causes is not shown to exist by said certificate of examination.

I am of the opinion that the combined effect from disabilities from pensioned causes is not shown by the certificates of medical examinations to be equivalent to the loss of a hand or a foot for the purpose of manual labor, and claimant is therefore not entitled to the third-grade rate provided in the act of March 3, 1883.

The action appealed from is accordingly affirmed, and the papers in the case are herewith returned.

INSANE OR HELPLESS MINOR—DISABILITY.

MINOR OF REUBEN ALDEN.

Evidence shows that said child has been afflicted from birth by depression of breast bone upon the spine, displacing vital organs, and rendering him extremely nervous and weak to such an extent that he has been mentally and physically unable to care for or support himself. He can not perform effective or remunerative labor and is considered permanently helpless, in the contemplation of the proviso to the third section of the act of June 27, 1890, and entitled to a continuance of his pension after arriving at the age of 16 years.

Assistant Secretary Webster Davis to the Commissioner of Pensions, November 18, 1898.

Phœbe Alden, widow of Reuben Alden, late of Company F, Seventy-seventh New York Infantry, was allowed pension in 1867, from the date of her husband's death, which occurred in service February 4, 1864. Included in such pension was \$2 per month for one child, Henry A. Alden, which she drew until he reached the age of 16 years, October 21, 1871. Subsequent to the passage of the act of June 27, 1890, she filed an application, December 8, 1890, alleging that said child was permanently helpless and that she should be again allowed pension on his account under the proviso to the third section of said act. This claim was rejected May 15, 1893, on the ground of "no title, said minor having passed the age of 16 years prior to date of filing

claim." A declaration was then filed December 11, 1893, by said child himself, alleging his right to pension under said act. Again the claim was rejected, March 23, 1894, on the ground of—

No title, the widow of soldier living and a pensioner in her own right, and claimant not entitled under act of June 27, 1890, to pension for helplessness, as claimant was over 16 years old at passage of act.

The widow then filed another declaration May 29, 1894, of similar import, and this was rejected April 11, 1895, on the ground that "said minor child was not insane, idiotic, or permanently helpless." The widow and mother of said child died January 29, 1897, and another declaration similar to those preceding was filed July 12, 1897, by Ransom K. Dwyer, guardian. And again the claim was rejected, March 4, 1898, on the ground that—

the alleged helpless child is not insane, idiotic, or otherwise permanently helpless within the meaning of the act of June 27, 1890.

From this action appeal has been entered May 23, 1898, by the attorney of said guardian, upon the contention that the evidence on file, including the verdict of a jury, clearly shows the permanent helplessness of said child and that he is entitled to the benefit of the act.

The evidence in this case shows that this child has been afflicted from his birth. According to the testimony of his mother, his birth was accomplished with great difficulty, and the attending physician in some way broke his breastbone, so that ever since it has pressed upon his stomach and almost reaches to his spine, causing displacement of most of the vital organs. Further, it is shown that he had epileptic fits almost daily from the time he was five months old; that these continued for several years, seriously impairing his physical and mental powers, and since the cessation of the fits he has been subject to a constant tremor, his head especially always shaking. It is further stated that he has never been able to perform any remunerative labor; that he was supported by his mother while she lived, and has since been supported by charity, having been a portion of the time in the county almshouse.

In regard to this condition of said child the statements of the mother are corroborated by the testimony of several neighbors, especially since he became 16 years old, and they declare that his mental and nervous condition is such that he is incapable of caring for and supporting himself. The following medical evidence shows more definitely the nature and extent of his disabilities:

Dr. George F. Comstock, in 1893, testified that he had known said child for ten years, and that he is permanently disabled for supporting himself by reason of a deformity in his chest; that there is a depression at the lower part of the sternum, which extends nearly to spine, displacing lungs, heart, stomach, and liver. He has organic disease of heart and a severe nervous trouble; also chronic inflammation of the lining membrane of the brain and spinal cord.

Dr. Tabor B. Reynolds, in affidavits filed in 1894 and 1895, testified

that for more than twenty years said child had been totally disabled, mentally and physically, for earning his support; that he is suffering from a severe contraction of the sternum and ribs, pressing upon the thoracic viscera, and is mentally incapacitated.

Dr. Richard H. McCarty has known said child four years, and knows he is mentally and physically unable to care for and support himself on account of the following condition: a defect of the sternum which nearly touches the spinal column. He has treated him for piles and inflammation of rectum. The spinal cord is affected to a certain extent, which causes nervous twitching and affects the head and other parts of the body. He is very excitable at times. He can not do manual labor, and does not consider him any part of a man for mental or physical duties. He has also been treated for fistula.

Dr. Osmond J. Travers has known said child ten years, and thinks him mentally and physically unable to support himself. He is afflicted with a depression of the sternum, which penetrates nearly to the spinal column. This was caused by an injury received at birth. He is incapacitated for doing manual labor; is also suffering with a chronic inflammation of the rectum, which from time to time causes abscess; has a fistula at present time (October, 1897). A most obstinate condition of constipation is ever present. He has a trouble of the spinal cord and nerves that causes a tremor of the head almost continuously, and a condition of general muscular and nervous excitability is always present. These ailments prevent him from being able to do manual labor, and render him unable to care for and support himself, from mental incapacity.

In addition to the foregoing, medical examinations have been held in January, 1895, and February, 1898. The first of these describes his condition thus:

Fairly well nourished; muscles moderately firm; palms hard; tongue normal; throat congested; skin florid; expression and countenance show mental weakness; general physical appearance fair as to vigor.

Chest.—Contracted anteriorly with stooping deformity; lower half of sternum, including sternal ends of four lower ribs, depressed 2½ inches, a cup-like cavity, 4 inches diameter, with slight tenderness on pressure; resonance and respiratory sounds, normal; measurements, respiration, 34; inspiration, 34½; expiration, 33½.

Heart.—Apex beat, area dullness and sounds normal; action moderate in force; rhythm regular. Pulse, standing, 90; after exercise, 96; no lesions.

Injury (see Chest).—Physical evidence confined to anterior chest deformity, with tenderness; to slight spinal curvature in lower cervical and upper dorsal region, and tenderness, with alleged occasional pain over lower cervical vertebræ. The head is thrown forward and to right side, fixed, with involuntary muscular tremor involving head and both hands, increased by exercise, slight; coordination of movement (walking) not impaired; sensation normal; no paralysis of limbs; reflexes normal. There is slight ptosis, eyes otherwise normal; history of epilepsy, shaking of head and tremor of hands date from its disappearance at 10 years of age. We believe disability due to spinal irritation, sequel of epilepsy resulting from alleged injury.

Mental condition.—From personal observation of claimant for several years, his record in the community, together with the result of this examination, there is marked evidence of mental deficiency. He has been repeatedly dismissed when employed for

light errand work as wholly incompetent. Condition aggravated by if not entirely due to physical lesions mentioned.

Piles.—Three external tumors, average three-eighths inch diameter, engorged, one hemorrhagic; no fissures or fistula; alleged extreme constipation.

No evidence of syphilis or vicious habits.

We believe claimant totally incapacitated for earning a livelihood by reason of both mental deficiency and physical disability.

The later examination shows the following:

Fairly well nourished; muscles soft; palms moderately so; tongue coated, fissured, pointed, tremulous; throat severely congested, catarrhal; skin normal; countenance senile; expression weak; general physical appearance shows mental and physical weakness.

Chest.—Stooping form, flattened anteriorly, above, with flattened sulcus at lower end of sternum, involving lower ribs, three-fourths inch; depression, 3 inches; condition from personal knowledge of board, congenital; resonance and respiratory sounds normal; measurements, rest, 36; inspiration, 36½; expiration, 35½.

Heart.—Apex beat, normal space one-half inch right nipple line, by palpation; area of dullness to left; sounds muffled, indistinct, diastolic; no murmurs, action diminished in force, epigastric pulsation; rhythm regular; pulse small, soft, compressible; standing, 94; after exercise, 120; no cyanosis, dyspnea or edema.

Mental condition.—He is not insane or idiotic, but his mental faculties are so weak that he is unable to perform any kind of remunerative work; there is general tremor, head constantly shaking, thrown forward and inclined to the right; there is slight curvature of lower cervical and upper dorsal vertebræ. He is, from personal knowledge, wholly disabled by reason of mental deficiency to provide for his support. Rate seventeen-eighteenths. No evidence of syphilis or vicious habits. Urine normal.

From the foregoing evidence it seems plain that while this child of the soldier is not insane or wholly idiotic, yet he is very weak mentally, or simple as some witnesses state, and this, with his bad physical condition, renders him incapacitated for performing effective and remunerative labor. As before stated, several witnesses, including William and Mary Trouton, Henry Smith, and Walter Jennery, state that this mental and physical condition has existed ever since said child was 16 years old, and before, to the extent that he was unable to care for or support himself during any part of the time, but that he was supported by his mother up to her death and by charity since. Under the decision in the cases of John M. Laughlin (8 P. D., 52), Frances Stetzell (9 P. D., 9), Ellie Morris, widow (9 P. D., 353), and Minors of William Johnson (9 P. D., 452), it is believed that such a condition of permanent helplessness is shown as brings the case within the scope of the statute, and establishes title to an allowance thereunder.

It is not clear that said child has never performed any labor nor that he has not earned some wages at times, but from what is shown it is evident that he has not been able to do any but the lightest work, and that his earnings were never sufficient for his support, while his mental condition has been such as to render him almost irresponsible. It is concluded that a fair case is made out by the evidence, and the pension should be allowed. The action by which the claim was rejected is accordingly reversed and the papers are returned for readjudication.

SERVICE—INDIAN WARS—ACT JULY 27, 1892.

ELIZABETH W. WOOD (WIDOW).

Under the act of July 27, 1892, service rendered in the Black Hawk war, the Creek war, the Cherokee disturbance, or the Florida war with the Seminole Indians, must be rendered in one of the wars therein expressly named. No other, or different military service, even though rendered in the United States Army during the period named in said act, would be a pensionable service.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
November 18, 1898.*

Elizabeth W. Wood filed in your Bureau on September 29, 1892, an application for pension under the provisions of the act of July 27, 1892, as widow of John Wood (deceased), late private, Captain Duncan's company (F), United States Mounted Rangers, alleging that said deceased soldier had rendered thirty days' military service in the Indian wars during the period from 1832 to 1842; had been honorably discharged from such service, and had died on March 6, 1883, leaving her as his widow, surviving, and that she had not remarried since the death of said soldier.

Her said claim was rejected on March 31, 1893, upon the ground that the military service of the deceased soldier was not rendered until after the close of the Black Hawk war.

From said action appeal was taken on January 15, 1898.

While the ground for the rejection of this claim, as above stated, is correct so far as it goes, it would perhaps have been better stated and more correct to have based said action of rejection upon the ground that the evidence failed to show that the deceased soldier had rendered military service in any of the Indian wars named in the act of July 27, 1892, during the period from 1832 to 1842, for thirty days' military service in which pension is provided by said act, as more comprehensive and more responsive to the facts established by the evidence in the case.

It is strenuously contended in this appeal that any military service, of thirty days' duration, rendered during the period named in said act in connection with movements and operations of the United States Army against hostile Indians, and an honorable discharge from such service, would entitle a soldier or his widow to pension under the terms of said act; and it is further contended that as this soldier's enlistment was during the Black Hawk war, his military service in the United States Army should be presumed to have been rendered in that war.

The official military record of the deceased soldier's service shows that he enlisted in the above-named organization on November 5, 1832, and served therein until September 23, 1833, when he was honorably discharged and mustered out by reason of the expiration of his term of service. During this period the stations of his command are shown to have been at Vandalia, Ill., from November 5 to December 10, 1832; at

Fort Leavenworth, Kans., from January 6 to May 9, 1833; on "Expedition to southwest boundary," from May 9 to July, 1833; at Fort Leavenworth, Kans., from July, 1833, to date of muster out. As is shown by the foregoing record, the only active service ever performed by the deceased soldier, other than garrison duty at the various posts above named, was while serving with his command on the "Expedition to the southwest boundary" in May, June, and July, 1833. This "expedition" is shown by the evidence in the case to have been simply a detail of his command to guard and protect a supply train over the old Santa Fe trail, which was sent out to relieve and provision the posts and garrisons of the Army located in that section. This appellant, herself, admits that she is unable to determine, or to furnish any proof showing in which of the Indian wars the military services of her deceased husband were rendered, and she has no proof or knowledge of any active service in the field ever rendered by him, other than when upon the "Expedition to the southwest boundary," above referred to.

The Black Hawk war ended in September, 1832, treaties of peace having been made with the hostile Indians engaged in said war on the 15th and 21st of that month. This deceased soldier enlisted in the service in November, 1832, consequently his military service could not have been rendered in, and had no connection whatever with, said war, and the contention that his said service should be presumed to have been rendered in said war by reason of the date of his enlistment has no force whatever.

The remaining contention of this appeal, that any military service of thirty days' duration in the United States Army against hostile Indians during the period from 1832 to 1842 is sufficient to meet the provisions of the act of July 27, 1892, and give title to pension thereunder, is equally as untenable. The language of said act does not admit of any such interpretation. It expressly provides, in as plain and unequivocal terms as it was possible to make them, a pension for such surviving officers and enlisted men of the military or naval forces of the United States as served for thirty days in the Black Hawk war, the Creek war, the Cherokee disturbances, or the Florida war with the Seminole Indians, during the period from 1832 to 1842, inclusive, and who had been honorably discharged from such service, and for such other officers, soldiers, and sailors as may have been personally named in any resolution of Congress for any specific service "in said Indian wars," whose term of service therein may have been less than thirty days, and for the surviving widows of all such officers and enlisted men, provided such widows have not remarried.

The language of said act is so plain and explicit as to be, of itself, a sufficient answer to the contention of the appellant, and the meaning of its terms is so apparent as to admit of no judicial construction or interpretation, and renders any further discussion of the question a mere waste of time.

The military or naval service for which a pension is provided by said act is a service rendered in some one of the Indian wars therein expressly named and designated, and no other, and, in order to entitle a claimant to pension under its provisions, it must be made affirmatively to appear by the proof that the military or naval service, on account of which the claim for pension is made, was rendered in one of said specified and designated wars. No other, or different military service, even though rendered in the United States Army during the period named in said act would be a pensionable service, or confer any right or title to pension whatever under its provisions.

In this case there is not a particle of evidence showing that the deceased soldier ever served in any of the Indian wars named in said act; in fact, it is practically admitted by this appellant that he did not. Consequently, the rejection of this claim was not error, and is affirmed accordingly.

DEPENDENCY—ACT OF JANUARY 29, 1887, CONSTRUED.

JOHANNA GATES (WIDOW).

A widow before becoming 62 years of age is not entitled to pension under the act of January 29, 1887, unless she has no other means of support than the ordinary proceeds of her manual labor and the contributions of others not legally bound to aid in her support.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
November 18, 1898.*

The appellant, Johanna Gates, February 23, 1894, filed a declaration for pension under the act of January 29, 1887, as the widow of August Gates.

Her husband served in Battery M, Third United States Artillery, in the war with Mexico, from September 6, 1847, to July 27, 1848. He was married to the claimant March 19, 1865, and died January 21, 1894. The claimant was born October 14, 1847, and, therefore, was in the forty-seventh year of her age when she filed this claim for pension. She alleges that she is dependent upon her children for support, and is disabled for performing manual labor by rheumatism and nervous prostration. (See second declaration, filed September 18, 1896.) The claim was rejected October 5, 1897, upon the ground that claimant was unable to show she is dependent or disabled within the meaning of the act of January 29, 1887. Appeal was entered November 9, 1897.

The claimant is the owner of real estate in the cities of Leavenworth and Kansas City, Kans., of the assessed value of \$12,165 and of the estimated value of \$22,800. She owes debts to the amount of \$6,000. Taxes, insurance, interest, and repairs aggregate about \$1,200 per annum. The property consists of at least twelve houses and buildings, which are rented, and thirty or more vacant lots. The income from

said property averages \$900 per annum. Appellant states she would sell the property for three times its assessed value. This is her price. The actual value of the property is the amount it will sell for, which appears, from competent evidence, to be \$22,800. The claimant, therefore, owns real estate of the actual value of \$16,000 over and above all indebtedness. It appears that her estate is not managed so as to yield her any income. However, the management of claimant's financial affairs is not a factor in this case. It appears that she has other means of support than the proceeds of her manual labor, to the amount of \$16,000 invested in real estate.

Dr. J. W. Brock testified by affidavit September 12, 1896, that claimant has rheumatism in her left side, and is thereby disabled for housework. No medical examination has been ordered in the claim. Upon special examination Dr. Brock could not remember the claimant or her case. He did not repudiate the affidavit. The claimant testified that she had rheumatism. Such is practically all the testimony upon this point. The claim was rejected upon the ground that appellant was not disabled within the meaning of the act. As no medical examination was ordered, such action would be erroneous for that reason were that ground germane to claimant's rights under said act. Another reason assigned for the rejection of the case is that claimant is not dependent within the meaning of the act of January 29, 1887, which reads:

SECTION 1. That the Secretary of the Interior be, and he is hereby, authorized and directed to place on the pension roll the names of the surviving officers and enlisted men, including marines, militia, and volunteers, of the military and naval services of the United States, who being duly enlisted, actually served sixty days with the Army or Navy of the United States in Mexico, or on the coasts or frontier thereof, or en route thereto, in the war with that nation, or were actually engaged in a battle in said war, and were honorably discharged, and to such other officers and soldiers and sailors as may have been personally named in any resolution of Congress for any specific service in said war, and the surviving widows of such officers and enlisted men: *Provided*, That such widows have not remarried: *Provided*, That every such officer, enlisted man, or widow who is or may become sixty-two years of age, or who is or may become subject to any disability or dependency equivalent to some cause prescribed or recognized by the pension laws of the United States as a sufficient reason for the allowance of a pension, shall be entitled to the benefits of this act; but it shall not be held to include any person not within the rule of age or disability or dependence herein defined, or who incurred such disability while in any manner voluntarily engaged in aiding or abetting the late rebellion against the authority of the United States.

The rejection of the claim upon the ground that the appellant is not dependent is based, apparently, upon that portion of the act of January 29, 1887, hereinafter discussed, and which has been construed by the Bureau as providing for the allowance of pensions to widows under the age of 62 years, when they are shown to be dependent within the meaning of section 4707, Revised Statutes, which provides for the allowance of pension to dependent mothers.

Therefore, the conclusion reached that as the appellant owns real estate of the value of \$16,000, over and above all indebtedness, she is not dependent within the meaning of said act.

The particular portion of the act of January 29, 1887, construed by the Bureau, and also relied upon by the appellant, reads thus:

Provided, That every such officer, enlisted man, or widow who is or may become subject to any disability or dependency prescribed or recognized by the pension laws of the United States as a sufficient reason for the allowance of pension, shall be entitled, etc.

The appellant contends that the condition on account of which pension is granted to widows by the act of January 29, 1887, when under the age of 62 years, is one of dependency or disability; that is, in effect, if disabled for the performance of manual labor they are pensionable whether dependent or not, and when not disabled they are pensionable if dependent.

On May 27, 1898, in the case of Charles W. Johannes (9 P. D., 341), I held, in substance, that where a claimant for a soldier's pension under the act of January 29, 1887, shows he is disabled in a degree equivalent to some cause prescribed or recognized by the pension laws of the United States which would entitle him to a rate of \$2 per month may be entitled to pension under said act when under the age of 62 years. Whether he would be upon the ground that he is dependent was not discussed.

It may be said, however, that as the pension laws of the United States do not grant pension to soldiers for the reason they are dependent upon others for support, and as the dependency recognized and prescribed by those laws for granting pensions to other classes of claimants is their dependence for support upon deceased soldiers, it is fairly reasonable to presume that soldiers are not granted pensions by the act of January 29, 1887, by reason of any dependency prescribed or recognized by the pension laws of the United States granting pensions to persons who were not soldiers.

Nor is pension granted to widows of soldiers on account of disability. Although a widow pensioned under said laws was not required to show she was dependent for support upon her husband, the deceased soldier, said laws recognize her dependency upon him for support in providing for the allowance of pension to her upon his death. Supporting this statement and quite conclusive of its correctness is the fact that the several acts granting pensions to widows of soldiers contain a provision that pension shall cease upon their remarriage; although no reason is set forth in the law for this provision, it is quite clear that it is no other than this, that by her remarriage her dependent condition caused by the death of the soldier has ceased.

Also, the Department held in the case of Sarah J. Grooms (7 P. D., 210) that—

Pension in fact is granted to a widow to supply in part the support and aid she would be legally entitled to receive from her husband if living, but of which she is deprived through his military service rendered the Government.

As under the act of January 29, 1887, widows upon becoming 62 years of age are pensionable, it follows that the fact that they were deprived

of the support provided by their husbands is not a factor in determining their rights under said act until they become 62 years of age. In other words, the dependency which must be shown is not that which the law recognizes as resulting from the death of their husbands, but an actual dependency prescribed by the pension laws. Otherwise, widow claimants under said act, without any exception, would be entitled to pension although under the age of 62 years.

In the act of January 29, 1887, specific reference is made to the pension laws of the United States for the purpose of designating that dependency or disability which must be shown in order to entitle a claimant to pension under that act when under the age of 62 years.

The dependency prescribed by the pension laws of the United States giving title to pension is set forth in section 4707, Revised Statutes. Said section provides pensions for dependent relatives of persons embraced within the provisions of sections 4692 and 4693, Revised Statutes, upon their death by reason of any wound, injury, or disease incurred in the service, and specifies that the dependency thereby recognized is such as is presumed from the absence of means of support other than the ordinary proceeds of manual labor and the contributions of persons, except the soldier, not legally bound to aid in the support of a claimant (other than the father of the soldier) for a dependent relative's pension.

As the pension laws at the time of the passage of the act of January 29, 1887, did not allow pension to persons except the relatives of a soldier mentioned in section 4707, Revised Statutes, on account of any prescribed condition of dependency, and recognized no other dependency except that of a soldier's wife and children upon him for support, and in view of the fact that said act expressly provides the allowance of pensions to widows under the age of 62 years, who may become subject to any dependency prescribed by the pension laws, I am of the opinion that the dependency which must be shown by such widow in order to be entitled to pension under the act of January 29, 1887, is such dependency as is prescribed by section 4707, Revised Statutes, as herein stated.

Therefore the fact that claimant has real estate of the value of \$16,000 operates to defeat her claim for a widow's pension under the act of January 29, 1887, the same as it would to defeat a claim in her behalf for a dependent mother's pension under the general law upon the ground that she has other means of support than the proceeds of her manual labor, and hence is not dependent within the meaning of the pension laws.

It remains to consider the appellant's contention that, although she may not be dependent, she is suffering with a cause of disability prescribed or recognized by the pension laws, and therefore, under the act of January 29, 1887, she is entitled to a widow's pension before she attains the sixty-second year of her age, whether she is dependent or not.

Pension is granted to widows of soldiers to supply in part the

support they would receive were their husbands living. Now, when pension is thus granted for this reason to widows of the age of 62, or under that age upon another condition, it is not reasonable to suppose that such other condition would include adequate means of support in the event that the claimant was disabled for earning a support; rather, in view of the purpose for which pension is granted to widows, that would be the ground for denying them pension. Furthermore, as the dependency prescribed by the pension laws for giving title to pension is presumed, although a person is not at all disqualified for performing manual labor by reason of any physical or mental disability such as is prescribed by those laws for granting pension to soldiers, it is not reasonable to suppose that Congress, by the act of January 29, 1887, intended to grant pensions to widows on account of disability, when at the same time it provides for pensioning them if dependent, and, therefore, whether they have or have not any disability.

So, as this claimant has means of support, the fact that she is partially disabled for performing manual labor, and thereby to an extent is deprived of an income from her labor, does not bring her condition within the purview of any act granting pensions to any class of claimants on account of any prescribed or recognized condition of dependency; and the fact alone that she has a disability does not give her any right to pension as a widow, as disability is not a factor in a widow's claim for pension, certainly not in the absence of dependency prescribed or recognized by the pension laws of the United States. Hence, I am of the opinion that the claimant is not entitled to pension under the act of January 29, 1887, unless she is shown to be dependent.

I have endeavored to point out that section 1 of said act grants pension to soldiers therein designated on account of disability, and to their widows when under 62 years of age on account of dependency. The gist of my reason for this construction of the statute is that pensions have not been granted to widows on account of disability nor to soldiers on account of their being dependent upon others for support, by any pension law of the United States prior to the passage of said act, and as its language, in its ordinary acceptation, permits said construction without doing violence to it, I do not feel constrained to accept it as meaning something foreign to all prior pension laws, but rather to construe the act in harmony with those laws with regard to the cause expressed therein for granting pensions to soldiers and their widows. So, as those causes are, disability in a soldier's case, and dependency (recognized) in a widow's case, and particular reference to those laws is made in the act of January 29, 1887, they are in a manner incorporated therewith for the purpose of elucidating the intent of Congress as expressed therein, and therefore such construction is placed upon said act as accords with those recognized principles of pension legislation found in prior pension laws, to which particular reference is made in the act itself. A more liberal construction would not promote justice; no good purpose would be served and no intent of Congress would

be carried out by a more liberal interpretation. Hence, as nothing but the language of the act without the light afforded by a knowledge of the pension laws would sustain a more liberal construction, it is believed that the one I have placed upon the act of January 29, 1887, expresses its actual meaning and covers its full scope.

I am, therefore, of the opinion that a widow is not entitled to pension under the act of January 29, 1887, before she is 62 years of age, unless she is shown to be dependent within the meaning of the pension laws, although it appears she is disabled.

As the evidence shows that this appellant is not dependent within the meaning of those laws, the rejection of her claim upon the ground indicated was proper.

IDENTITY—SERVICE.

JOHN H. THOMPSON, ALIAS JOHN CLARK.

The record shows that John Clark was enrolled as a substitute for one William H. Converse, February 11, 1863, and was discharged November 11, 1863, by reason of the expiration of his term of enlistment. The testimony of persons who knew claimant and met him in the service where he was serving under the name of John Clark; of his sisters who corresponded with him under the name of John Clark, of Company D, Sixteenth Michigan Volunteers; the testimony of William H. Converse, and descriptive list of said Clark, as to his personal description, show that the claimant is the identical John Clark who served in said company and regiment, notwithstanding the fact that he denies that he enlisted as a substitute.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
November 18, 1898.*

The claim of John H. Thompson, alias John Clark, filed October 2, 1889, for pension under the act of July 14, 1862, on account of asthma, alleged to have been contracted while in the military service of the United States as a private in Company D, Sixteenth Michigan Infantry, was rejected by your Bureau in September, 1897, on the ground of his inability to furnish satisfactory evidence that he contracted said disability in the service as alleged, or that he was the person who served as John Clark in Company D, Sixteenth Michigan Infantry. A later application, made under the act of June 27, 1890, was rejected at the same time, on the ground that the evidence, after special examination, failed to establish his identity as the man who performed the service on which the claim was based. An appeal was filed in October, 1897, the contention of which is that the identity of the claimant with the soldier John Clark, of Company D, Sixteenth Michigan Infantry, is established.

The records of the War Department show that John Clark, of Company D, Sixteenth Michigan Infantry, was enrolled February 11, 1863, and discharged November 11, 1863, by reason of the expiration of his term of service. After a careful examination of the evidence I am of

the opinion that the man so enrolled and discharged was the identical person who, under his true name of John H. Thompson, is now an applicant for pension. The evidence leading to this conclusion is as follows:

The testimony of C. Jeff Van Debergh and Isaac W. Garvin (Special Examiner W. W. Macy's report) shows that it was a matter of common report among Thompson's acquaintances that he was in the Army. His brother (see same report) testifies that he came home wearing soldier's clothes, and said that he had been in the Army. Witness always understood that he served under another name.

The claimant's sisters (McConnell's report) testify that they received letters from him and wrote to him while he was in the service; that he was in the Sixteenth Michigan Infantry, and that when they wrote to him they addressed their letters to John Clark.

Joseph King (Miller's report) testifies that he knew claimant well before the war; that in July or August, 1863, his regiment (the Forty-fourth New York Infantry) and the Sixteenth Michigan were brigaded together, and during that time he was visited by claimant, and visited him in return, and knows that he was serving in the Sixteenth Michigan (thinks he was in Company D), and that he was then known as John Clark.

Stephen Mills, who was a sergeant in Company D, Sixteenth Michigan, testifies (see Patton's report) that he slept in the same tent with John Clark of that company, and that he came from Illinois and knew a great many men in the Eighth Illinois Cavalry, all of which is true in regard to the claimant. His description of the said John Clark is a good description of the claimant.

The descriptive list of John Clark, of Company D, Sixteenth Michigan Infantry, agrees in every particular with what we know of the claimant, John H. Thompson.

The only reason for doubting that the claimant is the man who served as John Clark appears to be that John Clark was enlisted as a substitute for one William H. Converse, of Hillsdale, Mich., who had been drafted, while the claimant swears that he was not a substitute for anyone, but enlisted as a volunteer.

Unquestionably he is prevaricating. William H. Converse's description of the man whom he employed as a substitute fits him exactly, and there is abundant evidence that he entered the service as a substitute. There is some confusion of records, those of the adjutant-general of the State of Michigan showing that a John Clark who enlisted at Auburn, Mich., on March 3, 1863, for three years, and subsequently deserted, was the substitute of William H. Converse.

Some of the special examiners adopted a theory that the John Clark of Company D, Sixteenth Michigan, and the John Clark of Company K, Fourth Michigan, were one and the same person, but that theory is untenable in view of all the developments. The descriptions of the

men differ. One was 28 years of age, the other only 21. One was born in New York and the other in Ireland. One had blue eyes and the other dark eyes. One was a miller by occupation, the other was a painter or printer. One enlisted on the 11th of February and the other on the 3d of March, and both were forwarded from Detroit on the same day—March 11. We have in the latest report from the War Department tracings of their signatures, which seem to preclude the idea that they were written by the same man. After mature consideration I see no reason to believe that the John Clark of Company K, Fourth Michigan Infantry, had any connection with the John Clark of Company D, Sixteenth Michigan Infantry. The record of the former is no part of the material evidence in this case and need not be further considered.

The record of the service of John Clark of Company D, Sixteenth Michigan, is clean and straight from start to finish, and there can be no reasonable doubt that the claimant is the man who performed that service. There is only one point that seems to need any explanation. The record shows that John Clark enlisted on February 11, 1863. William H. Converse swears that he received notice of his draft on St. Valentine's day (February 14), and employed his substitute on February 24, the day the records show John Clark to have been mustered in. The question naturally arises, If Clark enlisted on the 11th, how could he have engaged to go as a substitute for Converse on the 24th? I am convinced that the explanation is that his enrollment was made to date back to the date of the draft. If Converse had served personally, his service would have been held to begin on February 11. As Clark took his place, it was only reasonable that his service should be regarded as commencing at the same time. In this connection the testimony of Joseph Hess is important. He was drafted at Hillsdale at the same time Converse was, and was given eight or ten days within which to report. He was regarded as in the service, however, not from the day he reported, but from the day of the draft, and was discharged (as was the claimant) just nine months from that date.

While there is no room for doubt that the claimant has testified falsely in stating that he did not enter the service as a substitute for William H. Converse, that fact alone does not afford sufficient ground for denying him a pension. It is immaterial, so far as his title to pension is concerned, whether he served as a substitute or as a volunteer. He may think otherwise, and for that reason may have endeavored to conceal the fact that he served as a substitute. There is a possibility, of course, that he is concealing some more important fact, but careful investigation and inquiry have failed to develop anything to sustain that theory, and I can not think that the man should be denied a pension because of a mere suspicion. The action of your Bureau is reversed, and you are respectfully requested to readjudicate the claims upon the view that the identity of the claimant with John Clark of Company D, Sixteenth Michigan Infantry, is established.

MARRIAGE OF SLAVES—EMANCIPATION—EVIDENCE.

MARIE L. BOSS (ALLEGED WIDOW).

It being material to a proper determination of the question as to the validity of the claimant's marriage to the sailor to know whether the latter died before or after slaves were emancipated by the adoption of the thirteenth amendment to the Constitution, and the evidence on that point being conflicting, the action is set aside and the case remanded for further inquiry—by special examination if necessary.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
November 19, 1898.*

Marie L. Boss, on January 16, 1897, filed a claim for pension under the act of June 27, 1890, as the widow of Francois Boss, who served during the war of the rebellion as a sailor in the United States Navy. Said claim was rejected by your Bureau in June, 1897, on the ground that she was never legally married to the above-named sailor. From that action an appeal was taken on September 30, 1897.

The claimant and the sailor were slaves in New Orleans, La., at the outbreak of the war, and were cohabiting as man and wife, having been married according to slave custom. The sailor enlisted on May 26, 1864, and was discharged on May 26, 1865, and after discharge returned to New Orleans and continued his marital relations with the claimant until he died. There is some uncertainty in regard to the date of his death. The claimant stated in a declaration for pension under the old law, filed in 1893, that he died on the 14th of May, 1865. That was plainly an error, as he was not discharged until May 26, 1865. In her declaration under the act of June 27, 1890, she gives the date of his death as May 14, 1866.

The contention of the appeal is that the provisions of section 4705 of the Revised Statutes apply to claims under the act of June 27, 1890, as well as to claims under the old law. The Department has ruled on this point and has held that said section has no application to claims under the act of June 27, 1890. (Polly Ann Chulaska Sinla, 7 P. D., 353; Lettie Hawkins, 8 P. D., 33.) The language of the statute forbids any other conclusion.

The only question to be considered is whether there was a valid marriage under the laws of Louisiana. The courts of that State have held that the marriage of slaves with their master's consent, though without civil effects during the slavery of either party, yet when ratified by continued cohabitation of the parties, after the emancipation of both, produces all the civil effects, ab initio, which result from marriage between free persons. (Girod v. Lewis, 6 Mart. La., 559; Pierre v. Fontenette, 25 La. An., 617; Pearce's Succession, 30 La. Ab., 1168; Ross v. Ross, 34 La. An., 860.)

It has been shown that the claimant and the sailor whose widow she

claims to be cohabited before his enlistment pursuant to a slave marriage and that they continued to cohabit after his discharge up to the date of his death. It seems to be held by your Bureau, however, that they did not become emancipated during the sailor's lifetime. The chief of the law division, in an opinion rendered June 22, 1897, to which you have invited my attention, says:

Nor did the parties become free by virtue of the President's proclamation of January 1, 1863, as they lived in territory expressly excepted. Sailor died before the ratification of the thirteenth amendment to the Constitution, and so, it would seem, he was never free to contract a legal marriage.

The thirteenth amendment was declared in a proclamation of the Secretary of State dated the 18th of December, 1865, to have been ratified by the legislatures of twenty-seven of the thirty-six States. The chief of the law division has assumed that the sailor died in 1865, prior to December, but, as has already been stated, this is by no means certain. It is certain that he did not die on May 14, 1865, the date alleged in the claimant's first application for pension. She now claims that he died in 1866.

The action of your Bureau is reversed, and the case is remanded for further inquiry (by special examination, if necessary) in regard to the date of the sailor's death. When it shall have been determined whether he died before or after the ratification of the thirteenth amendment to the Constitution, the claim should be readjudicated.

RESTORATION INCREASE.

GEORGE BALTZER.

Claimant having been a pensioner under the act of June 27, 1890, at the rate of \$6 per month, his name was dropped from the roll under said act, and was placed on the roll under the general law. September 16, 1896, he filed a claim for renewal and increase under the act of June 27, 1890, which was allowed by reissue on October 7, 1897, at \$10 per month from date of filing, September 16, 1896.

Held, That this was error; as the claim was one for restoration his name should have been restored at the rate of \$6 instead of \$10, as increase can only commence from the date of the certificate of medical examination showing an increased disability under section 4698, Revised Statutes.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
November 19, 1898.*

The claimant, George Baltzer, served in Company E, Sixth New Jersey Volunteer Infantry. August 14, 1893, certificate issued to allow him pension under the act of June 27, 1890, at \$6 per month from July 30, 1890, general debility, incomplete left inguinal hernia, and left varicocele being approved as disabling causes. On September 18, 1876, he had filed a claim under the general law on account of chronic diarrhea.

The claim was approved for admission, and on March 19, 1895, there was a reissue to allow pension under the general law at the rate of \$2 per month from discharge, and \$6 from July 21, 1892. Thereupon the claimant's name was dropped from the new-law roll. On May 3, 1895, he filed a claim for additional pension under the general law on account of disability due to rheumatism, and on September 16, 1896, he filed a second claim under the act of June 27, 1890. Both claims were approved for admission on September 25, 1897. In the latter claim, October 7, 1897, certificate issued for "renewal and increase" at \$10 per month, to commence September 16, 1896. In the general-law claim there was a reissue October 7, 1897, "to allow additional pension * * * rate, \$8 per month, commencing May 3, 1895, and ending September 15, 1896, by reason of renewal under the act of June 27, 1890."

February 4, 1898, appeal was entered in the claim under the act of June 27, 1890, by M. B. Stevens & Co., the attorneys, from the action of the Bureau in issuing certificate to allow renewal and increase. They contend, in substance, that the claim was for pension under said act; that the claimant's name, at the time said claim was filed, had long since been dropped from the rolls, not upon the ground that he had no title, but for the purpose of allowing pension under the general law; that when his name was so dropped he had no further right or title to pension under that law unless he proved his title anew, and that in approving the claim for allowance of pension from date of filing declaration the claim was accepted as a new claim for pension under the act of June 27, 1890, and not as a claim for renewal of soldier's former claim under that act for the purpose of allowing increase therein.

I am of the opinion that appellant's argument is sound. Under date of July 28, 1898, in a communication to you (9 P. D., 93) I held that—

Original pension having been allowed, any subsequent increase of pension must be based on the fact that there is increased incapacitation for earning a support by manual labor and must be adjudicated, so far as commencement of the increased rate is concerned, under section 4698½, Revised Statutes of the United States.

So, if any increase of pension under the act of June 27, 1890, was allowed in this case, the pension would not commence from date of filing declaration. Pension was allowed to commence from the date of filing the declaration, as the proceedings were considered as *de novo* under that law and the time was fixed for commencement of pension in accordance with the rule that would obtain had claimant never been allowed pension.

But the face brief shows that certificate issued to renew pension under the act of June 27, 1890, and to allow increase, and in this particular the action of the Bureau was error. If any increase of pension was allowed under said act, it would be on account of increased incapacity for performing manual labor and would commence from the date of the medical examination. The rate allowed was a higher rate of pension than claimant had received under the act of June 27, 1890, but it is in no

sense an increase of that rate, as there is no connection whatever between the claims in which said rates were allowed.

While the commencement of the rate was properly determined the face brief does not state correctly the purposes of the issue. It recites that the issue was to allow increase of pension, when in fact it was to allow pension anew, or to allow pension under the act of June 27, 1890; the face brief should be corrected accordingly.

The purpose of this appeal is to have the proper issue made that appellants may be paid such fee as they are entitled to receive for securing pension under the act of June 27, 1890. Therefore, upon correcting the face brief the case should be submitted to the proper division for the purpose of certifying such fee as attorneys would be entitled to for securing such pension as the corrected face brief shows to have been allowed.

It is only necessary to add in determining such fee that the rule laid down in the case of Jacob Young (9 P. D., 147) does not govern in claims under the act of June 27, 1890; that rule was laid down in a claim under the general law.

PATHOLOGICAL SEQUENCE.

GEORGE B. COCK.

Neither paralysis agitans nor cerebro-spinal sclerosis can be accepted as a pathological sequence of chronic diarrhea or any sequelæ thereof.

*Assistant Secretary Webster Davis to the Commissioner of Pensions
November 22, 1898.*

The claim for increase of pension, under the act of July 14, 1862, of George B. Cock, late captain Company G, Fifth United States Colored Infantry, now pensioned at the rate of \$24 per month, on account of "gunshot wound of left arm and chronic diarrhea and resulting indigestion," has twice before been considered by the Department. The said claim was filed January 11, 1897, and it was alleged therein that the disease of digestive organs for which the soldier was pensioned had resulted in "disease of nervous system (parasthesia)." Medical action was taken on the brief face in the said claim June 1, 1897, the rate for pensioned causes being increased to \$24 per month (third grade), the present rate, but the disease of nervous system manifested at the medical examination held February 24, 1897, was not accepted as a result of the causes alleged.

The said medical action, in so far as the said increase in rate is concerned, was in direct conflict with the expressed opinion of the medical referee, as set forth in slip dated April 21, 1897, and which is as follows:

Claimant is now pensioned at \$20 per month (total as captain) for gunshot wound of left arm and chronic diarrhea and resulting indigestion.

The claim has been carefully reviewed and no change of medical action is warranted.

The medical action referred to in the said slip was the action of November 13, 1896, rejecting a former claim for increase, filed April 6, 1896.

The question as to the pensioner's title to increase was first considered by the Department upon an appeal, filed July 29, 1897, from the aforesaid medical action of June 1, 1897.

Inasmuch as it is the desire of the Department that claimants for pension, or for increase of same, shall be afforded every reasonable opportunity to establish their title thereto, the prayer of the appellant that he be given the benefit of a special test examination by experts and specialists in spinal and nervous diseases was granted in a decision rendered by me November 15, 1897, in which I held that—

In view of the medical testimony filed tending to show that soldier's nervous affection, "paralysis agitans or sclerosis of spinal cord," was due to malnutrition or disease of the digestive organs, it is deemed but just to him that he have the benefit of a test examination by experts who should be given a history of the case and be instructed particularly to give an opinion as to whether the nervous condition was due to pensioned causes or any of them, and if not, to what they refer it.

In accordance with the views expressed and the instructions embraced in the said decision, the appellant was, on January 26, 1898, examined by the board of surgeons at Masillon, Ohio. From the objective conditions manifested at the said examination the board made a diagnosis of "cerebro-spinal sclerosis," but expressed the opinion that the preexisting disease of the digestive organs bore no causal relation thereto.

Upon the receipt of the certificate of the said examination the claim for increase was again considered, and again rejected by your Bureau. This action was also appealed from, July 28, 1898, the appellant contending that the Bureau had failed to get a correct idea of the etiology and pathology of his case.

It was further contended by the appellant—

That he is a constant and severe sufferer from excruciating cephalalgia, induced by disease of the stomach and indigestion; that this painful state has continued through many years and has induced spinal sclerosis with paralysis agitans, producing extreme helplessness and inability to earn a subsistence.

No evidence whatever was filed in rebuttal of the actions appealed from, but the testimony of Drs. Balmer, Biechele, Beecher, March, Tressel, and Myers, previously submitted in support of the claim for increase, filed January 11, 1897, received due consideration at the time the contentions of the second appeal were considered. Each one of the aforesaid physicians testified that he had made a personal examination of the claimant. Dr. Balmer found—

Progressive spinal disease, known as sclerosis, which disease comes under the head of parasthesia. " " " Considered him an almost complete bodily imbecile.

Dr. Biechele found—

Cerebro-spinal sclerosis, directly traceable to gastrointestinal disturbance.

Dr. Beecher found—

Paralysis agitans or sclerosis of the membranes of the cord, superinduced by malnutrition.

Dr. March found—

Cerebro-spinal sclerosis, a direct result of gastrointestinal disease.

Dr. Tressel found—

General paresis, paralysis agitans, and chronic gastritis, all results of chronic diarrhea and gastritis,

and Dr. Myers found—

Cerebro-spinal sclerosis, due to diarrhea and exposure to wet and cold.

The claimant (who is also a physician by profession) stated, in an affidavit, filed May 27, 1897, that—

The disease of nervous system, which so seriously disables him—in connection with his pensioned causes—as claimed in his application for increase of pension is traceable to his military service through the said pensioned causes, and that—by way of exclusion—no other cause of origin has existed in his case.

In passing upon the aforesaid contentions and medical evidence in my decision thereon, dated September 17, 1898, I stated—

That the Department had, in view of the conflicting professional opinions of the medical officers of your Bureau and the physicians who had testified in the claimant's behalf, acceded to the request of the appellant for a test medical examination by experts and specialists in spinal and nervous diseases, and that inasmuch as no complaint had been made in regard to the character and standing of the physicians before whom he was ordered or in regard to the thoroughness of their examination, it was assumed that they were recognized as experts and specialists in spinal and nervous diseases, and that they gave him a careful and thorough examination, as they were instructed to do; that they were asked to state whether, in their opinion, there was any connection between the causes for which he was pensioned and the nervous trouble, and they did so in the following language: "We can not associate any pathological changes originating from pensioned causes productive of their spinal sclerosis." That the Department understood this to mean that they did not think the spinal sclerosis was a result of the pensioned causes; that the physicians who entertained a contrary opinion had not cited any medical authorities in support of their position and were not known to this Department as experts or specialists in diseases of the nervous system; that the Department was unable to find anything in such medical works as were at hand to sustain their views; that the question at issue was purely a medical one, and that inasmuch as the weight of the expert medical opinion and authority was apparently adverse to the theory upon which the claim for increase was based, the rejection of the claim must be affirmed.

The question now before the Department in this case is a motion, filed October 29, 1898, for its reconsideration of the aforesaid decision of September 17, 1898.

The appellant asks for—

A reopening or rehearing of the claim on the filing of new evidence relating to the etiology and pathology of the disease, "multiple sclerosis of brain and spinal cord," as sequelæ of disease of digestive organs resulting from chronic diarrhea or army dysentery—

And further asks—

The privilege of amending his claim for increase, filed April 27, 1895, to include unusual exposure to cold, wet weather, incurred during the winter of 1863-64, as a cause or additional factor in the production of said disease.

The new evidence upon which a reopening or rehearing of the claim was requested does not appear to have been submitted.

The appellant attempts to sustain his former contentions by citing certain medical authorities as bearing out the theory of a casual relation between diseases of the digestive organs and lesions of the nervous system.

Osler is cited as stating (in his work on *The Principles and Practice of Medicine*) that—

Gastritis (inflammation of the stomach) or gastrodynia (pain in the stomach) is a neurasthenia in which the gastric juice or hydrochloric acid is secreted in excess, producing nervous dyspepsia with hyperacidity of gastric juice, a neuroses of secretion, and is associated with locomotor ataxia.

The appellant is in error in stating that Osler treats of gastritis, either acute or chronic, as a neurosis of the stomach, but gastrodynia, or gastralgia, is considered under the heading "Neuroses of the stomach," p. 359, and described as a—

severe pain in the epigastrium, paroxysmal in character, occurring as a manifestation of a functional neurosis independent of organic disease, and usually associated with other nervous symptoms; in chronic disease of the nervous system, forming the so-called gastric crises; and in organic disease of the stomach, such as ulcer or cancer.

The same authority recognizes three clinical forms of nervous dyspepsia: Page 361, (a) With normal secretion; (b) The condition of sub-acidity or inactivity; (c) With hyperacidity of the gastric juices. In the latter type the author states:

The percentage of acid may be doubled. This increase in the acid may be an intermittent condition or continuous. The periodic form is really a neurosis of secretion, which may be quite independent of the time of digestion. Such cases are new and are associated either with profound neurasthenia or with locomotor ataxia. The attack may last for several days.

The above facts are set forth by reason of the contention of the appellant in the pending motion that—

this hyperacidity has been a constant factor in my (his) case ever since the incurrence of the disease at Harrison's Landing, Virginia, in July, 1862, as an accompaniment of ulceration of stomach and intestinal tract,

and the evident effort on his part to connect the alleged condition of his stomach with the disease of his nervous system now shown to exist.

The appellant, being a physician, should, and probably does, know, and, were he entirely disingenuous, would readily acknowledge, that the rare type of nervous dyspepsia which Osler states is sometimes associated with locomotor ataxia is but the effect or a local manifestation of the central nervous disturbance and not the cause thereof.

Furthermore, the objective conditions manifested at the several medical examinations held in the claim preclude the idea that any sclerosis of the cord which may exist in this case is confined to its posterior columns—the lesion of *tabes dorsalis* (*locomotor ataxia*).

The exact nature of the nervous lesion in this case is not very clearly defined. The board of surgeons by which the claimant was examined both in 1896 and 1897 made a diagnosis of “paralysis agitans;” the certificate of the medical examination held January 26, 1898, states that the soldier is suffering from “cerebro-spinal sclerosis,” and the majority of the physicians who have testified in the claim, as heretofore noted, confirm the latter diagnosis, although two of them agreed with the former diagnosis.

Paralysis agitans is one of the synonyms for Parkinson’s disease (shaking palsy; senile chorea), the pathology of which shows no constant lesion, but is thought to be probably due to changes in the cerebral cortex.

Osler states that—

the similarity between certain of the features of Parkinson’s disease and those of old age suggest that the affection may depend upon a premature senility of certain regions of the brain.

In Pepper’s *American Text Book of the Theory and Practice of Medicine*, volume 1, page 639, H. C. Wood (clinical professor of nervous diseases, University of Pennsylvania), one of its authors, defines paralysis agitans as—

a disease of advancing life, characterized by tremors continued during waking hours, associated with muscular weakness and rigidity. Pathology uncertain.

As to the etiology of the said disease the same author states, on the same page—

Paralysis agitans rarely occurs under 40 years of age, is most frequent between 50 and 60, more common in men than in women, and is very rarely the result of hereditary influence. Violent fright, prolonged anxiety, exposure to cold, violent physical injury, especially when accompanied with great emotional disturbance, are occasional exciting causes of the disease.

In the majority of cases, however, the development of the disease is gradual and without apparent reason.

In regard to its pathology the said author further states, on the same page, that—

Some of the most noted neurologists have failed to detect any anatomical change in any portion of the nerve centers in persons who have long suffered from paralysis agitans. Under these circumstances speculation has been rife as to the nature of the disease, and various theories have been brought forward. None of these theories seem to me plausible, and certainly none of them are at all established.

On page 641 Professor Wood states that—

The diagnosis of a fully formed case of typical paralysis agitans is so easy as to need no discussion.

If the appellant is suffering from paralysis agitans (Parkinson’s dis-

ease), as stated by the board of surgeons which examined him in 1896 and in 1897, respectively, and by two of the aforesaid physicians who have testified in his behalf, I can find no warrant for accepting the said disease as a pathological sequence of the alleged disease of digestive organs, nor as being in any way caused thereby.

If, on the other hand, the diagnosis of cerebro-spinal sclerosis by the board of surgeons which examined the claimant in January, 1898, and by four of the aforesaid physicians, is correct, I am equally at a loss to find any authority for the assumption of the existence of any causal relation between the chronic diarrhea for which the soldier is pensioned, or any sequelæ thereof, and the said nervous lesion.

Cerebro-spinal sclerosis is a synonym for "insular sclerosis (sclerose en plaques)," under which head it is treated by both Osler and Wood, who are practically agreed as to its etiology, pathology, and symptoms. (Osler, p. 913; Wood, p. 711.)

Insular sclerosis (Charcot's disease; disseminated sclerosis; cerebro-spinal sclerosis; multilocular sclerosis; multiple sclerosis) is defined as—

a chronic affection of the brain and cord, characterized by localized areas in which the nerve element is more or less replaced by connective tissue. This may occur in the brain or cord alone, more commonly in both.

Etiology.—This is obscure. Kahler, Marie, and others assign great importance to the infectious diseases, particularly scarlet fever. Cold and exposure, mental shock, and injury have been referred to as possible causes.

Morbid anatomy.—The sclerotic areas are widely distributed throughout the brain and cord, usually in the white substance. The cortex is not often involved. The cord may be only slightly involved or there may be irregular areas in different regions.

Symptoms.—The most important features are (a) volitional tremor; (b) scanning speech; (c) nystagmus, diplopia, strabismus, and ptosis. Sensation is unaffected in a majority of cases. The reflexes, as a rule, are increased, particularly when there is a spastic condition of the legs. The sphincters are unaffected. Mental debility is not uncommon. Vertigo is not infrequent.

The diagnosis in well-marked cases is easy. Volitional tremor, scanning speech, and nystagmus form a characteristic symptom-group. With this there is usually more or less spastic weakness of the legs. Paralysis agitans, certain cases of general paresis, and occasionally hysteria may simulate the disease very closely.

While the acute infectious diseases are thought to be more or less important factors in the causation of insular sclerosis, many cases having been noted as following scarlet fever, measles, and diphtheria, although the precise relation is not known, I do not believe that any modern neurologist would entertain for a moment the theory advanced by the appellant that the cerebro-spinal sclerosis, from which he is alleged to be suffering, was caused by his preexisting disease of the digestive organs.

Notwithstanding the fact that both paralysis agitans and insular sclerosis are said, by the authorities cited, to be perfectly easy of diagnosis, there appears to be a wide divergence of opinion between the physicians who have examined the appellant as to whether he is suffering from the former or the latter disability. One physician, however,

in order that he may be sure, perhaps, of his diagnosis, states that the soldier is afflicted with both disabilities.

The appellant also contends that inasmuch as he never had any disability except those alleged, that if this Department is unwilling to accept the disease of nervous system from which he is shown to be suffering as a result thereof, that it is incumbent upon the Department to show the cause to which the said nervous affection is believed to be due. This contention is, of course, error, as the only question which the Department is bound to determine is whether or not the disabilities manifested are shown by the evidence and the facts presented in the case to be due, in any way, to the claimant's military service: Provided, that the said disabilities are not of such a nature as to preclude the idea that their service origin is susceptible of proof.

In the case at bar, as above stated, the exact nature of the new disability sought to be shown as a sequence of one of the causes for which the soldier is now pensioned is not clearly established, and which has been described as both paralysis agitans and cerebro-spinal sclerosis, but which is, in my opinion, if either, judging from the objective symptoms manifested, more probably the latter than the former, yet, whether it is the one or the other, it is not, in my judgment, susceptible of proof that the chronic diarrhea or any sequelæ thereof bore any causal relation thereto.

The appellant now complains that the examining surgeons who made the test examination, for which he prayed in his first appeal, are not specialists in diseases of the nervous system, although they are, he admits, good general practitioners, and again prays that he may be granted still another test examination by a known expert in nervous diseases. This course is not only unwarranted but unnecessary; neither can I see of what benefit it would be to the appellant.

While it is probably true that the surgeons composing the board by which the said test examination was made are not neurological specialists, their findings were, however, the same as those of four of the appellant's own professional friends and witnesses; yet, even were some expert neurologist to examine the appellant and find either the same or some other organic lesion of either the brain or the cord, or of both combined, it would still be impossible to accept the same as a pathological sequence of chronic diarrhea.

But one other contention in the pending motion remains to be considered. The appellant requests permission to amend his claim for increase, filed April 27, 1895, so as—

to include unusual exposure to cold and wet weather, incurred during the winter of 1863-64, as a cause or additional factor in the production of said disease.

A long history of the severe exposure to cold and inclement weather to which the appellant was subjected while in the service is given in detail in the pending motion as tending to show that the present condition of his nervous system is, in a large measure, due thereto.

This question is not properly before the Department for its consider-

ation, as no action thereon, from which an appeal would lie, has ever been taken by your Bureau.

The causes mentioned are recognized as factors in the production of the various scleroses of the brain and spinal cord, and while it is, perhaps, highly improbable that the appellant will be able to satisfactorily establish any causal relation between the said exposure to cold and wet weather and the disease of nervous system from which he is now suffering, by reason of the length of time elapsing between the date of the exposure and the date on which the first symptoms of the said nervous affection were manifested, he is, nevertheless, if he so desires, entitled to the privilege of prosecuting before your Bureau a claim for pension on account of a new disability (disease of nervous system) of service origin, independent of the disabilities for which he is now pensioned.

The facts herein set forth fully show why the actions appealed from were not error, and inasmuch as no new or material evidence has been filed, nor any good or sufficient reason advanced for receding from the views expressed in Departmental decision of September 17, 1898, and in view of the further fact that the very nature of the contention in this case is such as to preclude its being susceptible to proof, the pending motion for its reversal is overruled and the papers in the case are herewith remanded.

EVIDENCE—NEW DISABILITY.

MATHIAS M. BRUNER.

The rule announced in the case of *Thomas H. Strange* (7 P. D., 36) that "whenever, in a claim for increase of pension under the general law, an applicant, after long and unexplained silence, alleges a new disability of which there is neither record nor medical evidence, the adverse presumption arising from the absence of such evidence is open to rebuttal by the testimony of officers, comrades, and neighbors; but such presumption is not outweighed by the mere recital, under oath, of assertions made long since by the soldier himself or by general and vague statements of witnesses, and can be overcome only by direct and positive proof of incurrence and existence, or by satisfactory evidence as to facts and circumstances from which said incurrence are to be naturally, fairly, and reasonably inferred," appears to be well founded, and its proper application can work no injustice to either the claimant or the Government.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
November 22, 1898.*

Mathias M. Bruner, late color sergeant Company H, Ninety-sixth Illinois Infantry, by his attorneys, on April 1, 1898, filed a motion for reconsideration of departmental decision of February 28, 1898, affirming the Bureau action of February 4, 1897, rejecting his additional disability claim, certificate No. 63057, filed May 28, 1891, on the ground of no record and claimant's inability, after a special examination, to establish by satisfactory proof the origin or existence of deafness in the service.

The contention and argument of claimant's attorneys are as follows:

We believe that the decision of the Department affirming the action of rejection in this claim is an extension of the rule laid down in the case of Thomas H. Strange (7 P. D., 36), far beyond the bounds of reason and justice, and for this reason this motion for reconsideration is made.

It is admitted that a number of the soldier's comrades testify that he has been deaf since the battle of Chickamauga. Although the case was specially examined, the Department says that their affidavits are *ex parte*. Were the comrades not seen by the special examiner? It appears that the special examination was conducted as to the general merits of the case. The evidence of Dr. Sheffield is also discredited, because claimant made an affidavit that he had had no medical treatment for deafness since his discharge, except by Dr. Corey. An examination of the affidavit of Dr. Sheffield, made in 1891, will show that it contained the following statement:

"That he has been applied to frequently by the claimant for treatment (for deafness), but, knowing the origin of the disability, declined to undertake to treat the case, as he did not believe it to be amenable to treatment; he therefore only prescribed domestic remedies."

This, we submit, is a sufficient explanation of the alleged discrepancy that the Department finds in the testimony of the claimant and Dr. Sheffield. The correct meaning of the affidavit is plainly apparent, we believe, and neither may fairly be held to impeach the other.

The evidence is not the "mere recital, under oath, of assertions made long since by the soldier himself," nor are the statements of the witnesses "general and vague." They speak from personal knowledge and observation. Deafness is a disability apparent to all persons with whom a person is brought in association. The comrades say that the claimant was deaf; they do not say he told them that he was. Although Dr. Sheffield did not treat the claimant for deafness, he showed that the claimant applied to him for treatment therefor immediately after his discharge. The Department admits that it appears, with moral and reasonable certainty, that claimant's hearing has been very much impaired for an indefinite period of years' reaching back at least twenty-five years prior to the time of filing the declaration, i. e., to 1866. We are unable to understand by what course of reasoning the Department can conclude that the evidence establishes the existence of deafness since 1866 without admitting that it also shows the existence of deafness since September, 1863, the alleged date of incurrence. The evidence appears to be as conclusive of the one as of the other.

If, as admitted, the deafness existed in 1866, and did not, as is held, exist prior to discharge in February, 1864, the origin of the deafness must be assigned to the two years immediately following discharge. Is there any evidence tending to show that it did in fact originate during those two years? Did the special examination show any sufficient cause for deafness during that time? If not, there seems to be an unavoidable necessity for accepting that as true which is testified by the claimant and his witnesses.

We have this day filed in the Pension Bureau the testimony of two more members of soldier's company showing the origin of deafness in the service. This makes a total of six comrades on that point, and we believe it ought to be sufficient to overcome the presumption upon which the claim was rejected.

That such presumption is ill founded is fully believed, and the reasons for our belief were set forth in our appeal of July 14, 1897. The Department fails to answer, or even allude to, the argument therein presented. We believe that it is deserving of attention because it is based on a knowledge of the reasons why soldiers did not allege all their disabilities, and particularly their diseases, in their earlier applications, which knowledge is derived from long experience in the preparation and filing of claims.

The papers in the case fail to disclose the affidavits of the two members of claimant's company alleged to have been filed with the appeal.

It was contended in the former appeal that:

Such presumptions as those announced in the *Strange* case (7 P. D., 36) should not be allowed to operate in the adjudication of pension claims, nor in any event be allowed to outweigh testimony which would otherwise be sufficient; that "a pension is not a debt, but a donation of a charitable nature;" that "there should be no presumption of diligence in seeking a charity, particularly when the procuring of the same, as in the average pension claim, is a matter of several years and much evidence."

Soldier enlisted August 15, 1862, and was discharged January 22, 1863. He filed his first application for pension November 13, 1865. His claim was allowed April 28, 1866, less than six months from filing his application. On May 28, 1891, over twenty-seven years after his discharge, he first alleged deafness incurred at the same time that his pensioned disabilities were received—September 20, 1863. Claimant, when asked by the special examiner why he had delayed filing his claim for pension on account of deafness so long if it originated in the service, replied:

Because as long as I could get along without it I let it go. It was not because I was not deaf, as I have told you.

This is claimant's only reason for failing to assert a legal right for over twenty-seven years, during which time he, by repeated effort, was seeking to secure an increase of the pension he was receiving.

The testimony of claimant's comrades as to incurrence is as follows: Richard C. Cullen, a member of claimant's company, testified before the special examiner August 17, 1896, that claimant had been deaf in one or both ears for several years; that he first noticed that he was deaf at least twenty years ago (1876), but can not state definitely the length of time. He further testified as follows: "I have no knowledge as to the origin or cause of deafness." His attention being called to his affidavit in the case, he further testified:

If I stated in that affidavit, and it appears that I did, that his deafness was caused by the cannonading at Chickamauga, it was based on his statement afterwards to me, which I had no reason to doubt.

First Lient. George W. Pepoon testified, August 17, 1896, before the same examiner, to his long acquaintance with claimant, to his being wounded in service, and in relation to deafness he testified as follows:

Claimant has been more or less deaf for a number of years, but I can not tell just when his deafness commenced, or whether it is in any manner due to his service. I can state nothing about the origin of his deafness.

When shown his affidavit in the case he testified that he did not intend to say that he knew that claimant's deafness was due to the service or existed at that time, because he did not know.

L. S. Van Dervoort, sergeant in claimant's company, testified at date to his intimate acquaintance with claimant and to his sound prior to being wounded.

He testified in relation to deafness as follows:

He has been deaf a good many years, but I could not say how long. I don't remember that he was deaf when he came out of the service, but he may have been to a slight extent. I know nothing about the cause or origin of his deafness, and I don't remember when I first noticed his deafness. It has been growing worse on him right along. * * * I have made an affidavit in this case, the one you have just read to me, but I did not intend to say that I knew that he was deaf at any time in service. The first that I knew of his deafness was some time after I had returned from the service, which was in June, 1865.

Oscar Robbins, a member of claimant's company, testified at same date that he and claimant were members of the same G. A. R. post; that he does not know how long claimant has been deaf, but thinks it has been ever since service; that he is not clear about it; that he has been very deaf for a long time, but can not remember just how long; that he did not know what caused it; never heard claimant say what caused it; does not know whether his service had anything to do with it.

Dr. D. A. Sheffield, assistant surgeon of claimant's regiment, who had testified in an affidavit June 17, 1897, to his personal knowledge that claimant's disability had its origin from concussion of cannon shot on the battlefield of Chickamauga, testified before the special examiner August 20, 1896, that he was satisfied from his knowledge of claimant prior to and since his service that he incurred the deafness during his service, because he was not affected in that way prior to his enlistment; that he was partially deaf on his return from the service, and that it was his understanding from the history claimant gave of it that it was caused by concussion of cannon at Chickamauga battle, he being in the front as color bearer and exposed to the jar of the cannonading.

This witness does not pretend to testify that he was present at said battle or that he had any personal knowledge of the incurrence of deafness, and the records show that he resigned February 6, 1863, seven months and thirteen days prior to said battle, and the records fail to show that he rendered any service as a medical officer after his resignation.

Absolom Powers, Capt. Joseph L. Pierce, and John A. Francisco, comrades, who had testified in affidavits to claimant's deafness in service, all died before they were subjected to the test of a special examination. Powers, who had testified that claimant's deafness was from the cannonading and firing at Chickamauga September 20, 1863, is shown by the records of the War Department to have been sent to hospital at Nashville, Tenn., April 8, 1863, and was not present with claimant at said battle in September; Francisco was wounded at said battle of Chickamauga September 20, 1863, the same day that claimant was wounded; Captain Pierce, who was captain of claimant's company, in his affidavit testified to claimant being wounded in battle, but makes no reference to his deafness.

Claimant was discharged on a surgeon's certificate of disability, in which no mention is made of deafness, nor is there any record evidence that claimant suffered from deafness in service.

Claimant admits that he received no treatment for deafness in service, but alleges that he suffered from roaring in his ears while in hospital and continuously since said battle.

His wife testified that she did not see him while in the service until he came home on a furlough after he was wounded; that she can not tell exactly when that was, but that there was nothing the matter with him then besides his being wounded, only he complained of a roaring in his head, which he said was caused by the roar of the cannon and so many gun shots; that she does not remember he said when or where it occurred, because she did not pay much attention to it; that he did not say anything about being defective in hearing at that time, but a short time after discharge she noticed he was hard of hearing; that he was not home more than a couple of months before she noticed it; that what made her notice it, she would whisper to him to try to wake him, as she used to when she heard a noise; that he had gradually been growing worse.

It would appear from the foregoing that the case was properly held to come within the rule announced in the case of Thomas H. Strange (7 P. D., 36), reaffirmed in the case of David Kiley (8 P. D., 449), and Shadrick Lee (9 P. D., 214).

It is unreasonable to believe that if claimant's hearing was impaired to the degree and from the cause alleged, and which disability would have entitled him to a higher rate of pension than he received from his wounds, that he would have delayed for twenty-seven years to assert his legal right and accept the bounty which the Government had continuously tendered him from the date of discharge, when during the same period he was seeking to secure the highest rate for his other disabilities.

To ignore the presumption raised by his silence and delay is to reject the elemental rules of evidence and the plain teachings of everyday practical experience.

The argument contained in the appeal that commendation, not adverse presumptions, should be the sequence of a delay to claim pension does not appear applicable to this case.

So, also, the argument that—

there should be no presumption of diligence in seeking a charity when the procuring of the same is a matter of several years and much evidence—

loses its force when urged in a case where the claimant filed his application for the alleged "charity" less than ten months after discharge and secured an allowance of his claim five months and fifteen days after filing his application. It would also appear that delay on the part of the Government would be a reason for diligence on the part of the applicant.

The rule announced in the case of Thomas H. Strange (7 P. D., 36) appears to be well founded after careful consideration, and its proper application can work no injustice to either the claimant or the Government, but, on the contrary, protects the legal rights of both.

I find no valid or satisfactory reason for reversing or in any manner modifying the former departmental decision in this case, and the motion for reconsideration is accordingly overruled.

The papers in the case are herewith returned.

EVIDENCE—PRESUMPTION OF DEATH—MARRIAGE.

PRISCILLA CHILDERS (ALLEGED WIDOW).

The statute of Kentucky relative to presumption of death applies only where the absent person shall have gone from the State and does not return to the State for seven successive years, and there being no evidence in this case that claimant's first husband ever left the State, his death can not be presumed, and her marriage to the soldier was, therefore, null and void.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
November 25, 1898.*

Samuel Childers, formerly of Company C, Fifteenth Kentucky Cavalry, died on February 22, 1891. The soldier was in the military service of the United States during the war of the rebellion, from August 14, 1862, to October 29, 1863, on which day he was honorably discharged.

On March 11, 1891, Priscilla Childers filed a declaration for widow's pension under the act of June 27, 1890 (No. 507600).

Her claim was rejected on November 3, 1897, on the ground that claimant was formerly married to one James Howard, who was not shown to be dead or divorced.

From this action appeal was taken on December 1, 1897, which rests upon the following contention:

It is contended that the rejection of the claim is an error of law.

The claimant was married to the soldier in the year 1877. She had been previously married and her first husband disappeared in the year 1868. Since his disappearance he has not been seen or heard from or of until some time in the year 1872, when it was reported that he died during said year. The second marriage of the claimant was based upon presumptive evidence of death of her first husband; and it is believed that under the laws of the State of Kentucky, where the parties resided, the second marriage was legal. The statute of the State of Kentucky on the subject says:

"If any person who shall have resided in this State go from and do not return to this State for seven successive years he shall be presumed to be dead in any case where this death shall come in question, unless proof be made that he was alive within that time."

The claimant, in her statement before the special examiner in October, 1897, said in substance that she was married to soldier in the State of Kentucky, where she has always resided, on August 2, 1877; that she had been formerly married to James Howard on August 18, 1867; that they lived together nearly twelve months, when he left her and she has never heard from him or of him since, except that she heard as a mere

rumor that he died in Missouri in 1872; that her said first husband, Howard, was kind and affectionate apparently, and always provided for her wants; that she knows of no cause for his abandonment except that he went to Paducah and got drunk and disposed of some property which belonged to his neighbors, and went away with the money which he got in exchange for the property to avoid a criminal prosecution; that when she married the second time, she, in good faith, believed her first husband to be dead, from the fact that when he left he had something like consumption. Her testimony as to the material facts is corroborated by several witnesses.

It will be observed by reference to the statute of Kentucky relied upon by the claimant that the same applies only where the absent person shall have gone from the State and does not return to the State for seven successive years. Even if said statute should be held to be the law of this case, the same would not avail the claimant, for the reason that there is no proof that her first husband has ever left said State of Kentucky. If the vague rumor that the first husband died in Missouri should be accepted as evidence, then there would be no necessity to invoke the aid of the statute, for that rumor would establish his death prior to her second marriage.

The facts in this case are similar to those in the case of Helen L. Pepper (current series, No. 198), wherein it is held that—

The death of the husband can not be presumed from the fact that he deserted his wife, howsoever long said desertion may continue.

The act of desertion in this case is explained by the fact that the husband did so to avoid criminal prosecution on account of a crime which he had committed, and his continued absence is explained in the same way.

The presumption of death does not, therefore, obtain.

The action appealed from is without error, and is hereby affirmed.

PATHOLOGICAL SEQUENCE—EVIDENCE—MEDICAL REFEREE.

SARAH J. MAY (WIDOW).

Generally, where an attending physician appears to be in good standing his diagnosis of the patient's disease is accepted as correct; but when it comes to a question as to whether one disease resulted from another or not the ipse dixit of such attending physician is not received unless in accord with the generally accepted teachings of medical science (as to which the Department will be advised by the medical referee) or unless it derives some peculiar and extraordinary value from such physician's professional standing and experience.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
November 28, 1898.*

The claim of Sarah J. May for pension as the widow of John May, formerly a soldier in Company D, One hundred and forty-second Ohio Infantry, was rejected by your Bureau in June, 1896, on the ground

that the soldier's death was not due to the diseases (chronic diarrhea and piles) for which he was pensioned, or otherwise due to his military service. On appeal, that action was affirmed by the Department January 16, 1897. A motion for reconsideration was filed January 25, 1898.

A copy of the decision of January 16, 1897, is hereto attached. In support of the motion for reconsideration the appellant cites a decision rendered by Assistant Secretary Bussey on June 3, 1889, in the case of the widow of Charles F. Brown (3 P. D., 92), in which the diagnosis made and the opinion expressed by the surgeons who attended and treated the soldier in his last illness were accepted in preference to the theory of the medical referee as evidence showing the cause of the soldier's death; also the decision in the case of Mary A. Cox (3 P. D., 313), in which it was held that—

Where the evidence, lay and medical, goes to show that the cause for which pension was granted to a soldier was complicated with a disease which was the immediate cause of the soldier's death, the Department will sustain the widow's claim for pension on account of the soldier's death from said complication of causes, holding the same, for pensionable purposes, to be due to the line of duty in the service

Also the decision rendered August 21, 1897, in the case of the minors of Napoleon B. Trask (9 P. D., 113), in which the rule laid down in the case of Mary A. Cox was reaffirmed.

The decision in the case of the widow of Charles F. Brown, referred to, did not announce, as a rule of general application, that the opinion of a soldier's attending physicians should be accepted in preference to the opinion of the medical referee as evidence of the cause of his death. The attending physicians in Brown's case were men well known to the Department by reputation—one of them having been for many years medical referee of the Pension Bureau, and the other an eminent practitioner in this city—and it was largely by reason of this fact that their opinion was given the weight accorded it. The general rule is to accept the testimony of the attending physician as to all matters of fact coming under his personal observation. Usually, where he appears to be a physician in good standing, his diagnosis of the patient's disease or diseases is accepted as correct. But when it comes to a question as to whether one disease resulted from another or not we get into the field of medical theory in which the ipse dixit of the attending physician is not to be received unless it is in accord with the generally accepted teachings of medical science (as to which the Department will be advised by the medical referee) or unless it derives some peculiar and extraordinary value from the said physician's professional standing and experience.

In the case now under consideration the soldier's attending physicians say that the immediate cause of his death was dropsy and that, in their opinion, the remote cause was chronic diarrhea. But it appears that for two years preceding his death he suffered greatly and increasingly from valvular disease of the heart, which is one of the most frequent causes of dropsy, and one of the physicians (Dr. Beard) says, in effect, that valvular insufficiency caused the dropsy in this case. Dr. Young

says he thinks the heart trouble was due to a dropsical effusion around the heart, but he can not substantiate that opinion, as there was no autopsy, and according to his own testimony the heart trouble appeared long before there were any manifestations of dropsy. I think it is reasonable to conclude that the dropsy was a result of the heart disease. Dr. Beard thinks the heart disease was caused by physical weakness resulting from chronic diarrhea. The medical referee says, in effect, that the form of disease of the heart which is shown to have existed in this case could not have resulted from chronic diarrhea. If that view is not sustained by medical authorities the appellant should introduce evidence to establish that fact. In the absence of such evidence the Department will be guided by the medical referee's opinion.

But it is contended that even though there was no pathological connection between the chronic diarrhea and the valvular disease of the heart and dropsy, yet the chronic diarrhea was present as a complication, and, under the Cox and Trask decisions above referred to, the widow's claim is admissible.

In the case of Nanna J. Smith (9 P D., 359) the Department had occasion to define the word "complicated," as used in the case of Napoleon B. Trask, and held that it meant

involved, interwoven, or connected with;

and that—

to entitle a widow to a pension under section 4702, Revised Statutes, she is required to show that the disease, wound, or injury of soldier of service origin, in line of duty, had some probable connection with or relation to death cause and was a contributing and presumptive predominating factor in producing death.

For reasons heretofore stated it is held that this soldier's army disease (chronic diarrhea) had no agency in causing his fatal disease and was not "a presumptive predominating factor in producing death." He survived the incurrence of said disease of army origin for more than thirty years, attaining the age of 69 years, and died only after he had contracted an incurable disease of the heart.

In view of all the facts and after careful consideration of all the evidence I am of the opinion that the former decision should be adhered to. The motion is, therefore, overruled.

DESERTION—RECORD.

SARAH ANN SULLIVAN (WIDOW).

It appearing that the official record of the deceased soldier's military service is incomplete, and did not furnish sufficient data upon which to base the action rejecting this claim, said action is reversed, with directions that the same be reopened, the War Department be called upon for additional information relative to the length of the term for which the deceased soldier first enlisted in Company H, Nineteenth Kentucky Volunteer Infantry, and the claim readjudicated on its merits in accordance with the decision of this Department in the case of John Norton (9 P. D., 382).

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
November 25, 1898.*

Sarah Ann Sullivan filed in your Bureau, on January 15, 1896, an application for pension under the provisions of section 4702, Revised Statutes, as widow of John Sullivan (deceased), late private Company H, Nineteenth Kentucky Volunteer Infantry, and Company D, Second Ohio Volunteer Heavy Artillery, alleging the death of said soldier on January 4, 1896, from disease contracted in line of duty during his military service. Her said claim was rejected on April 2, 1897, upon the ground that it was shown by the official record of the deceased soldier's military service that he had deserted from his first term of enlistment in Company H, Nineteenth Kentucky Volunteer Infantry, and had never been discharged therefrom.

From said action appeal was taken on November 20, 1897.

The deceased soldier is shown by the evidence to have died on the date alleged from "catarrhal pneumonia." He had been pensioned in his lifetime under the provisions of the Revised Statutes for "pleuritic adhesions and effusion of right side," result of an attack of pneumonia in service in January, 1864. It is contended in this claim that his fatal attack was directly caused and superinduced by the disabling causes for which he had been pensioned.

The official military record of the deceased soldier's army service shows that he first enlisted as a private in Company H, Nineteenth Kentucky Volunteer Infantry, on October 19, 1861, and deserted therefrom on September 20, 1862. He never returned to said company and regiment and was never discharged therefrom, and the War Department reports relative to said record of desertion, as follows:

There is no evidence before this Department warranting the removal of the charge of desertion and the issue of an honorable discharge.

He enlisted for a second time as a private in Company D, Second Ohio Volunteer Heavy Artillery, on June 23, 1863, for three years "or during the war," and served therein until April 25, 1864, when he was discharged upon a surgeon's certificate of disability.

This claim was evidently rejected upon said record of desertion from the soldier's first term of service under the decision of this Department

in the case of George Lessor (8 P. D., 114), wherein it was held that a charge of desertion from an enlistment for service in the war of the rebellion, which the War Department declines to remove, would bar title to pension under any existing law.

The ruling in the Lessor Case has, however, been very materially modified and changed by a subsequent decision, rendered June 21, 1898, in the case of John Norton (9 P. D., 382). In this latter case the opinion of Attorney-General Taft (15 Op., 157) was adopted and adhered to that a soldier could not be considered as in desertion from a term of enlistment for military service beyond the date when such term of enlistment would expire, the contract of enlistment and the offense of desertion being deemed to terminate at the same time. It was also held therein, as the fourth general proposition and ruling on the subject of desertion, that—

If the disability was incurred in the service under a subsequent enlistment, while the claimant was a deserter from a prior enlistment which had not terminated prior to such reenlistment, the claim should be rejected on the ground that the disability was not incurred in the line of duty, but while claimant was absent from his proper command in violation of his former contract of enlistment.

Applying the foregoing principles, announced in the Norton decision, to the facts of this case, it is obvious that if the term of service for which the deceased soldier had enlisted in Company H, Nineteenth Kentucky Volunteer Infantry, had expired by legal limitation prior to January, 1864, when he alleged and the record shows he contracted the disability for which he was pensioned, he could not be held as having been in desertion at that time, but in the line of duty, and his pension on account thereof was properly and legally granted to him. Likewise, if it should be shown that his death was due to said disability of accepted service origin, or to any other disease or disability contracted in line of duty during his military service subsequent to the legal expiration of his first term of enlistment, this appellant would undoubtedly be entitled, under the provisions of section 4702, Revised Statutes, and the ruling in the Norton decision, to pension as his widow, notwithstanding the fact of his previous desertion from Company H, Nineteenth Kentucky Volunteer Infantry.

The length of time for which the deceased soldier enlisted to serve in Company H, Nineteenth Kentucky Volunteer Infantry, becomes, therefore, a very material and necessary fact to be ascertained in the adjudication of this case. In fact, under the present rulings of this Department, this appellant's pensionable rights can not be properly adjudicated and determined in the absence of evidence on that point.

The report from the War Department, giving the record of soldier's service in Company H, Nineteenth Kentucky Volunteer Infantry, which is on file in this case, and upon which this claim was rejected, is entirely silent as to the length of time for which he enlisted to serve therein. It merely states that he enlisted on October 19, 1861, and deserted Sep-

tember 20, 1862, and states no other facts relative to said service. At the time of the enlistment of the soldier he could have been enlisted for either one, two, or three years under the calls for troops then in force. If he enlisted for one or two years, then his first term of service would have legally terminated prior to January, 1864; and if it should be determined from the evidence that his death was caused by the disability then contracted, or by any other disability contracted in line of duty during his second term of military service after the legal expiration of his first term of enlistment, then his desertion from said first term of service would be no bar to the grant of pension to his widow. If, on the contrary, his first enlistment was for a term of three years, it would cover the whole period of his second service, and he would properly be considered as having been in desertion during all of said time from his second enlistment to his final discharge, and could not have been legally and properly pensioned for any disability incurred or contracted during said period; nor would this appellant be entitled to pension as his widow under the provisions of the Revised Statutes if his death be shown to have been due to any cause then contracted. It is very apparent, therefore, that the record of the deceased soldier's first service, as certified by the War Department in this case, was not full and complete enough, and did not state sufficient facts upon which to base the rejection of this claim of his widow upon the ground of the desertion of the soldier from said term of service. Before this claim could be properly adjudicated, under the present rulings of this Department, the War Department should be again called upon to furnish from its records the length of time for which the deceased soldier enlisted in Company H, Nineteenth Kentucky Volunteer Infantry, and the date upon which said term of enlistment legally terminated; and that failing, other evidence should be sought and obtained, if possible, to ascertain and determine that fact, and the claim then considered and adjudicated in the light of such information as herein indicated.

In order that this may be done, the rejection of this claim upon the ground stated is hereby reversed and set aside, and you are directed to cause the same to be reopened and reconsidered, another call made upon the War Department for the information to which attention has been herein directed, and readjudicated on its merits under the ruling in the case of Norton (*supra*) and the directions herein contained.

SERVICE—ACT MARCH 25, 1862.

IMRE RADWICH.

This officer was appointed a captain in Engineer Corps of United States Volunteers.

He served more than ninety days in that capacity during the war of the rebellion, received payment therefor, and was honorably discharged from said service. Held, That he comes within the provisions of the act of June 27, 1890, and is entitled to pension thereunder.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
November 25, 1898.*

The appellant, Imre Radwich, late captain, Engineer Corps, United States Volunteers, filed a declaration March 24, 1891, for pension under the act of June 27, 1890, alleging as disabling causes rupture and disease of liver, catarrh, and varicose veins. This claim was rejected May 11, 1896, on the ground that the report of the War Department fails to show that claimant had a pensionable service under the act of June 27, 1890.

From this action the recognized attorneys filed an appeal November 13, 1897, in which it is contended that claimant was recognized as an officer in the United States Army by the fact that the commanding general of the department issued a special order accepting his resignation and honorably discharging him from the United States service.

The facts in this case as to service appear to be analogous to the service of a number of officers similarly appointed by Maj. Gen. John C. Fremont, United States Army. The following is a copy of the original appointment of claimant on file in the case:

HEADQUARTERS WESTERN DEPARTMENT,
St. Louis, August, '61.

SIR: You are hereby appointed captain of the Pioneer Corps and will report to these headquarters for duty.

Your rank and pay will date from the 12th day of July, 1861, the commencement of your service.

J. C. FREMONT.

Capt. IMRE RADWICH.

It appears that this officer was discharged the service under the following special order:

SPECIAL FIELD ORDERS, } HEADQUARTERS DEPARTMENT OF MISSISSIPPI,
No. 75. } *Camp on Corinth Road, Miss., May 26, 1862.*

9. * * * Capt. I. Radwich, Engineer Department, is hereby honorably discharged the service of the United States.

By order of Major-General Halleck:

J. C. KELTON,
Assistant Adjutant-General.

This order is indorsed as follows:

Paid Captain Radwich in full. Paducah, May 29, 1862. V. C. Hanna, Paymaster, U. S. Army.

The Second Auditor United States Treasury, under date of February 4, 1892, states:

The records of this office show that Imre Radwich was paid as captain, Engineer Corps, for the period July 12, 1861, to May 26, 1862.

Under date of March 3, 1892, the War Department reports as follows:

Respectfully returned to the Commissioner of Pensions.

The name of Imre Radwich has not been found on the records of the Pioneer Corps and no record has been found of his appointment as captain by Maj. Gen. John C. Fremont.

It is proper to add that in the case of an officer who was similarly appointed by General Fremont as chaplain, and paid as such from August 13, 1861, to June 4, 1862, it was held by this Department that while it would appear that the appointee was not a chaplain *de jure* between these dates, yet this Department can not refuse to recognize him as having been an officer of the army *de facto* between the dates indicated (claim No. 920203 of John D. Abry).

The following letter from the Record and Pension Office, War Department, to Hon. James R. Howe, House of Representatives, furnishes additional data as to claimant's appointment, service with the army, and his honorable discharge from the service:

In compliance with the request contained in your letter of the 20th instant, received to-day, to be furnished with the military record of Imre Radwich, who, it is stated, was appointed a captain in the Pioneer Corps by Maj. Gen. John C. Fremont, commanding Western Department, about August 1, 1861, to date from July 12, 1861, I beg to inform you that no record has been found in this Department of the appointment of Imre Radwich as captain in the Pioneer Corps or as captain of engineers by Maj. Gen. John C. Fremont.

It appears, however, that on May 26, 1862, at camp near Corinth, Miss., Imre Radwich tendered his resignation as captain attached to the Engineer Department to Brig. Gen. G. W. Cullom, "chief of staff and engineer," on account of his health being such as to render him unfit for military duty.

His tender of resignation was indorsed by General Cullom as follows: "Imre Radwich, appointed by Major-General Fremont a captain of engineers, was temporarily retained in service by Major-General Halleck at the urgent solicitation of Gen. C. S. Smith, to take charge of the pontoon bridge at Paducah. Since that bridge was dismantled and the bateaux secured there has been no necessity for his service, although from Captain Radwich's statement it appears he has been retained on engineer duty by the commanding officer at Paducah up to this time. There being now no necessity for his services there, I recommend that he be at once discharged as he desires."

He was thereupon honorably discharged the service of the United States as "Capt. I. Radwick, Engineer Department," in Special Field Orders, No. 75, paragraph 9, Department of the Mississippi, dated May 26, 1862. No further record of the services of this officer has been found.

For information in regard to the payment of this officer application should be made to the Auditor for the War Department, in whose office the record of payments of officers and soldiers of the late war are filed.

From the foregoing records and history it appears very clearly that this officer was appointed to the rank of captain in the United States Army by General Fremont and was continued in said service by the order of his successor, Major-General Halleck; that he served more than ninety days during the war of the rebellion, and was paid for the entire period according to the rank to which he was appointed.

The grounds of rejection stated by the Bureau seem to rest entirely upon the question of General Fremont's authority to appoint. (See re-reviewer's slip of May 9, 1896.)

In the case of Mary C., widow of John D. Abry (8 P. D., 346), first lieutenant topographical engineers, United States Army, No. 602,857, Assistant Secretary Reynolds held as follows:

This officer is shown to have been appointed by competent authority to the rank of second and first lieutenant, and assigned to duty with the topographical corps of engineers, in the Department of Missouri.

It is also shown that in said capacity he performed more than ninety days' military service during the war of the rebellion, received pay therefor, and was honorably discharged. It is therefore held that the allowance of his claim, under the act of June 27, 1890, was lawful; that the widow in that respect is entitled to the accrued invalid pension, and also to pension in her own right, under provisions of said act.

In an exhaustive discussion of the case cited, my predecessor stated, among other things, the following:

It is a matter of history that when General Fremont took command of the Department of the West in July, 1861, he was given almost unlimited power by the President and the Secretary of War. He assumed command without specific instructions, but with the authority to use his own judgment and discretion in all things, as the exigencies of the service required. Clothed with inherent power, and in view of the neglect of the then Governor of the State of Missouri to come to his assistance, he immediately proceeded to appoint provisionally numerous officers for staff and regular duty. Some of these were subsequently commissioned by the President and others were not.

The services of all were recognized by the act of March 25, 1862, entitled "An act to secure to the officers and men actually employed in the Western Department or Department of Missouri their pay, bounty, and pension, providing as follows: The Secretary of War be, and is hereby, authorized and required to pay to the officers, noncommissioned officers, musicians, and privates, who have been heretofore actually employed in the military service of the United States, whether mustered into active service or not, where their services were accepted and actually employed by the generals who have been in command of the Department of the West or the Department of Missouri, the pay and bounty as in cases of regular enlistments."

The second section of said act also provides that such officers and privates, so employed who have been wounded or incapacitated for service, shall be entitled to receive pension allowed for such disability, thus bringing them within the provision of the first subdivision of section 4693, Revised Statutes.

Not only does this law recognize the services of these officers and privates, by providing for their pay, bounty, and pensions, the same as in cases of regular enlistment and muster, but it is observed that the Secretary of War in submitting his report in this case stated as follows:

"It is proper to add that in the case of a person who was similarly appointed by General Fremont as chaplain, and paid as such, from August 13, 1861, to June 4, 1862, it was held by this Department that while it would appear that the appointee was not a chaplain de jure between these dates, yet this Department can not refuse to recognize him as having been an officer of the army de facto between the dates indicated."

It should be remembered that the conditions existing in the Department of Missouri in 1861 were anomalous, and called for immediate and decisive action. Hence the commanding officers of that Department were given almost plenary power, and their official acts, so far as were deemed necessary, were confirmed in some respects by subsequent special legislation.

The same conditions do not appear to have existed elsewhere, and it is evident the rule of construction as applied in this class of cases can not be used for general application.

The views expressed in the decision cited are applicable to this case, the service rendered being similar. It is a matter of record that this officer was appointed a captain of engineers, and, as such, he performed more than ninety days' service during the war of the rebellion, was paid for such service, and was honorably discharged.

I am, therefore, of the opinion that he comes within the provisions of the act of June 27, 1890, and is entitled to pension thereunder.

The action appealed from is therefore reversed, and the papers are herewith returned for readjudication of the claim, with the view to allowance, if in other respects the claim is established.

ELECTION—PRACTICE—NOTICE.

JOSEPH MUCKENSTORM.

Claimant being in receipt of a pension under the act of June 27, 1890, his claim under the general law having been subsequently admitted, it was finally rejected on the ground of no benefit, and claimant was notified of such rejection, but not of the fact that it had been admitted on its merits.

Held, section 4715 vests the right of election in the pensioner alone, and said right is not lost, limited, or qualified by the opinion of any other person as to whether or not a payment under the general law would be beneficial. The latter part of the first proviso of section 2, act of June 27, 1890, expressly reserves the right of one entitled to the benefit of said act to receive his pension under the general law, if his claim under such law is proved. It is for the pensioner, under such circumstances, to make election, and he should be notified of the right to do so, issue of certificate under the general law being withheld until choice is made by claimant.

Assistant Secretary Webster Davis to the Commissioner of Pensions, December 7, 1898.

The appellant herein, Joseph Muckenstorm, formerly a private in Company K, Forty-fourth Indiana Volunteer Infantry, filed his claim under the general law on August 1, 1890, the claim being admitted on September 28, 1897, at \$6 per month, by reason of chronic diarrhea. A claim under the act of June 27, 1890, declaration having been filed on the same date as that of the general law, was admitted on March 25, 1891, at \$8 per month, by reason of chronic diarrhea, disease of rectum, and catarrh. An appeal filed on November 8, 1897, alleges that claim under the general law has been rejected, and that said action is contrary to the evidence, no contention, either direct or implied, being made as to the rate, for the claimant is ignorant of any rate having been allowed under the general law.

The face brief of this claim shows a legal approval for chronic diarrhea on September 17, 1897, for chronic diarrhea at six-eighths. Across the top of the face brief is written the following in red ink:

Reject; no benefit. Claimant now receives a higher rating under the act of June 27, 1890.

Accompanying the appeal is a circular letter received by the appellant from the Pension Bureau, a copy of which is as follows:

[Invalid certificate No. 555713. Joseph Muckenstorm, Company K, Forty-fourth Indiana Volunteer Infantry.

DEPARTMENT OF THE INTERIOR,
BUREAU OF PENSIONS,
Washington, D. C., October 12, 1897.

SIR: You are advised that the above-entitled claim filed August 1, 1890, under the act of July 14, 1862, was rejected October 1, 1897, on the ground that its allowance would confer no benefit on claimant, as the rate, \$8 per month, granted under the act of June 27, 1890, commenced from August 1, 1890, the date of filing the claim under act of July 14, 1862, and said rate is higher than that to which he would have been entitled under last-named act if allowed.

Very respectfully,

H. CLAY EVANS, *Commissioner.*

Mr. JAMES P. L. WEEMS, *Vincennes, Ind.*

Two things are especially to be noted herein: First, the claim was admitted at \$6 per month, and such action has never been receded from; second, the circular letter sent claimant does not recite such fact, but is couched in such language as to lead appellant to believe that his claim was never admitted. As a matter of fact, you have finally rejected this claim, but not upon its merits. You have rejected it upon the ground of "no benefit," which appears to be a term used by you as an expression of your belief that claimant would gain nothing if you issued him a certificate under said admitted claim. The question immediately arises, Has the Commissioner of Pensions a legal right to finally reject a claim under the general law, the sole reason for such rejection being that, in his opinion, it confers no benefit upon claimant?

Section 4715, Revised Statutes, as it applies to this issue, is as follows, viz:

Any pensioner who shall so elect may surrender his certificate and receive in lieu thereof a certificate for any other pension to which he would have been entitled had not the surrendered certificate been issued.

The language is clear, explicit, and unambiguous, and needs no construction. It bestows upon the claimant a right to elect whether he will continue to draw a pension which has been accorded him, the evidence to the title of which is his certificate, or whether he will surrender his evidence of title and receive "in lieu thereof" the certificate for another pension which has been granted him. The right to make the exchange vests in the pensioner by the express terms of the statute quoted, and the right is not lost, limited, or qualified in any manner by the opinion of any other person as to whether or not a surrender of the original certificate would be beneficial to claimant. It is not a question of benefit or no benefit; it is a question of choice under the statutes on the part of the claimant, independent of any other person's views on the matter.

Collateral phases of the matter involved herein have been before this Department more than once, the question generally turning upon the issue which you have raised in the case at bar, as to whether or not a pensioner would be benefited by an exchange of certificates; and the question seems to have almost always been discussed upon the presumption that a pensioner could receive no benefit unless it was apparent, by a mathematical calculation, that an immediate pecuniary gain was to be had by him. Now, I reiterate that section 4715, Revised Statutes, contains no terms, either express or implied, that allow the word "benefit" or its equivalent to be read into said section. What one pensioner might consider to be a benefit another might not; and a claimant might have widely different views from a Commissioner of Pensions as to what would be a benefit to him. The benefit, per se, to be derived cuts no figure, only so far as it may influence the mind of the individual in whom the law vests the choice or election, and that individual is the claimant, solus.

It is true that the Government to a certain extent guards the rights of its pensioners, and no practice would be righteous, neither would it be sanctioned, that allowed a pensioner unwittingly to be deprived of his rights. I can not, however, in this connection subscribe to the theory that the greatest good inures to the pensioner by drawing a pension under a certificate that would give him the most money immediately in hand in dollars and cents. There are many pensioners upon the rolls who originally drew the minimum rate under the general law and who by reason of such fact have had their pensions increased, and are to-day in legal receipt of ratings, by reason of the same pensioned causes, that are far in excess of the maximum rate under the act of June 27, 1890. I do not deem it necessary to enter into a detailed disquisition upon the matter, for I believe it to be clearly apparent that in many cases a lower rating under the general law is preferable, far more preferable, and productive of much more good in the future, and especially in the event of the death of the soldier, to his widow and children, than a higher rating under the act of June 27, 1890.

However this may be, or however much the opinion of different individuals may vary upon the question of a benefit to be derived under a given state of facts, the statute, as stated, is clear and explicit.

The latter part of the proviso of the second section of the act of June 27, 1890, contains the following:

Nothing herein shall be so construed as to prevent any pensioner thereunder from prosecuting his claim and receiving his pension under any other general or special act.

This part of the act of June 27, 1890, must be considered in *pari materia* with other pension laws, for its very terms recite that the rights under other pension laws are not changed in the particular quoted. Reading, then, the above just quoted in connection with section 4715, Revised Statutes, the conclusion is irresistible that a right proved up under the act of June 27, 1890, must be held subservient to the exercise

of choice by claimant in the event that he has proved his claim under the general law.

It is, consequently, the manifest duty of the Commissioner of Pensions under such a condition to notify the claimant of the admission of his claim under the general law, and to request him to make the election accorded him by law. The issue of the certificate under the general law should be withheld until the Commissioner of Pensions is properly notified as to the desire of the claimant in the matter.

The practice of rejecting a general-law claim after its admission, solely upon the ground that it confers no benefit upon claimant because of a previous rating under some other law, and of so notifying claimant, should be abandoned as contrary to law.

Your especial attention is directed to the fact that this holding is made upon a certain sequence of facts, viz, that a claim under the act of June 27, 1890, had been admitted and that claimant was drawing a pension thereunder; that at a subsequent date claimant proved up a claim under the general law, and that you had admitted such claim and affixed a rating thereto. The holding is not designed to apply in any way to any issue as to the effect section 4715, Revised Statutes, might have upon a different sequence of facts.

You will therefore at once take such steps as may be necessary to prevent the rejection of such a claim as the one at bar as of "no benefit." A claimant is entitled to know the exact facts, and any notice to him couched in such language as will lead him to believe that a different action has been taken in his claim than that actually taken is not in accordance with good practice.

The action of rejecting this claim because of no benefit is reversed, and you will notify claimant of his right to elect under section 4715, Revised Statutes.

INCREASE—ACT JANUARY 5, 1893.

JOHN A. HARDY.

It appearing that this pensioner has a life estate in, and the use and benefit of 15 acres of good farming land, upon which he resides, and personal property worth from \$90 to \$100, from which he derives an annual income of about \$75, he can not be held to be "in such destitute circumstances" that the pension of \$8 per month he is now receiving under the provisions of the act of January 29, 1887, is "insufficient to provide him the necessaries of life."

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
December 13, 1898.*

John A. Hardy, late private Company H, Third Ohio Volunteer Infantry, Mexican war, is a pensioner under the provisions of the act of January 29, 1887, as a survivor of the Mexican war, at the rate of \$8 per month, and on May 7, 1895, he filed in your Bureau an application

for an increase of said pension under the provisions of the act of January 5, 1893, alleging that he was wholly disabled for manual labor, and in such destitute circumstances that the pension he was then receiving was insufficient to provide him the necessaries of life. Said claim was rejected on April 29, 1898, upon the ground that he was not shown to be in the condition of destitution alleged.

From said action this appeal was taken on June 15, 1898. The conditions prescribed by the act of January 5, 1893, under which the increase of pension therein provided may be granted, are exceedingly rigorous and exacting. The pensioner under the act of January 29, 1887, must be shown not only to be "wholly disabled for manual labor," but also to be "in such destitute circumstances that \$8 per month are insufficient to provide him the necessaries of life," before he can be entitled to the benefits of the act of January 5, 1893. The terms of said latter act are express, plain, and unequivocal, and exclude from participation in its benefits all such pensioners who, although they may be shown to be very poor, and to be deprived of nearly all the comforts of life, are still able, with the assistance of the pension received under the act of January 29, 1887, to provide themselves with the bare necessities of existence.

In the present case this appellant is clearly shown to be "wholly disabled for manual labor." He is over 70 years of age, feeble, and in poor health, and upon a medical examination, made under this claim, the examining surgeons report him as "wholly disabled for manual labor."

It is shown, however, that he has a life estate in, and the use and benefit of 15 acres of good farming land, upon which he resides, and where he has a moderately comfortable home, some live stock, and other personal property, worth from \$90 to \$100, cash value, and that he derives from this property an average yearly income of about \$75, over and above his pension of \$8 a month, which he receives under the provisions of the act of January 29, 1887. With said pension his annual income is about \$170. He has no one dependent upon him for support but his wife, and although he is undoubtedly in very reduced circumstances and subjected to many privations on account of his poverty, it can not be held that his condition of destitution is such that he is unable to provide himself with the actual necessaries of life.

The conditions which entitle to the increase of pension provided by the act of January 5, 1893, not having been shown to exist in this case, it is clear that the rejection of this claim upon the ground stated was not error, and said action is affirmed accordingly.

COMMENCEMENT—INCREASE—ACT OF JULY 14, 1892.

JOHN JOHNSON.

Increase to the intermediate grade (\$50) provided by the act of July 14, 1892, must, by the express terms of the act, commence from the date "of the certificate of the examining surgeon or board of examining surgeons showing such degree of disability, and made subsequent to the passage of" the act.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
December 20, 1898. .*

A motion for the reconsideration of departmental decision of May 31, 1898, in the claim for increase and rerating filed May 13, 1897, in the case of John Johnson, late private, Company D, Second Wisconsin Infantry, certificate numbered 19,865, was filed September 28, 1898. By reference to the said decision, which is hereto attached, and a copy of which is now in the possession of the appellant, it will be seen that the action of your Bureau, dated March 11, 1898, rejecting the aforesaid claim for increase and rerating, was reversed in so far as the claim for increase was concerned, and affirmed in so far as it related to the claim for rerating.

It is contended in the pending motion that the Department erred in directing that the increase should commence from the date of the medical examination held under the said claim for increase and rerating instead of from July 14, 1892, the date of the passage of the act of Congress authorizing the \$50 rate in certain claims for pension. This contention is not only wholly untenable, but it is in direct conflict with the provisions of the act itself—which states, in terms, that all persons entitled to the rate prescribed therein shall receive the same—

from and after the date of the certificate of the examining surgeon or board of examining surgeons showing such degree of disability, and made subsequent to the passage of this act.

Inasmuch as the medical examination held November 15, 1897, was the only examination of the pensioner, either by an "examining surgeon or board of examining surgeons," that had been "made subsequent to the passage of this act," there was no authority of law for commencing the aforesaid increase in rate prior to "the date of the certificate" of the said examination.

The error of the further contention, by the attorneys for the appellant, that inasmuch as the pensioner had filed "one or more applications for increase" subsequent to the passage of the act of July 14, 1892, which applications had been rejected, the medical examination of November 15, 1897, "simply demonstrated what the previous examinations showed," is clearly shown by the foregoing statement of the facts in the case. The record in the case shows that the next preceding medical examination in the claim was held May 3, 1890, in consequence of an application for increase filed July 19, 1889, between which latter

date and May 13, 1897, no application of any character appears to have been filed by the appellant.

It is obvious, therefore, that no error was committed, nor any injustice done, in fixing the date of commencement of the increase in rate granted under departmental decision of May 31, 1898; that no other date of commencement of the said rate is warranted by existing laws, and that no valid reason has been advanced for the reconsideration of the said decision with a view to any change in the tenor thereof; in view of which facts the pending motion is overruled, and the papers in the case herewith remanded.

DEPENDENCE—ACT JUNE 27, 1890.

MARY E. HUGHES (WIDOW).

Claimant, who owned real estate of the value of \$6,000, conveyed the same to her children for a consideration of \$20; and it is held that she could not create a pensionable status nor be deemed without other means of support than her daily labor.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
December 31, 1898.*

Mrs. Mary E., widow of Capt. Daniel W. Hughes, late A. D. C., U. S. Volunteers, appealed December 2, 1898, from the Bureau action of June 7, 1898, rejecting her widow's restoration claim, certificate No. 287,225, filed February 17, 1898, under the act of June 27, 1890, on the ground that since the approval by the honorable Assistant Secretary of the Interior on May 12, 1894, of the action dropping pensioner from the roll on the ground of nondependence, no evidence has been furnished which rebuts or tends to rebut the proofs that she had other means of support than her daily labor.

Claimant contends that the charge upon which her name was dropped from the rolls was not proved; that the rejection of her claim for restoration was contrary to the law and the evidence; that she had conveyed her property to her children for a nominal consideration prior to filing her application for restoration, and that her entire income since December 4, 1893, had been but \$121.03 per year, and this only when her house was rented.

Soldier was appointed June 22, 1861, and was honorably discharged May 31, 1866. He was married to claimant November 27, 1872, and died March 3, 1883.

Claimant filed her application for pension under the act of June 27, 1890, on July 2, 1890, and was pensioned under said act as the dependent widow of the said soldier March 11, 1891, at \$8 per month.

In her said application for pension she testified "that she has no other means of support than her daily labor."

Irving C. Brown and William N. Sayer testified in an affidavit Jan-

uary 12, 1891, that they were well and personally acquainted with claimant, and knew that she had no income from any source whatever except that derived from her daily labor.

The Bureau, relying upon the truth of these affidavits as to dependence, allowed her pension claim under said act of June 27, 1890, and she appears to have drawn pension from July 2, 1890, to March 3, 1894, at \$8 per month as the dependent widow of said soldier. After a special investigation of her case, her name was dropped from the roll by the Bureau action of May 3, 1894, approved by the Acting Secretary of the Interior May 12, 1894.

In her application for restoration she alleged that she was even more dependent upon the assistance of others than at the time when the pension was issued, and in an affidavit executed May 4, 1898, she testified that on December 4, 1893, she owned a five-sixths interest in the west half of lot 10, in John P. Ingle's subdivision of lots in square 518, Washington, D. C., which was improved by a three-story frame dwelling which she occupied, which was encumbered by a deed of trust for \$2,000 bearing 6 per cent interest; that at the same date she owned an undivided interest in the west 20 feet front by depth of original lot No. 17, in square 732, which was unimproved and encumbered by a deed of trust for \$2,493.14 bearing interest at 6 per cent; that besides the above-mentioned real estate she owned personal property consisting of household furniture, wearing apparel, etc., not exceeding \$150 in value; that on December 14, 1893, and March 1, 1897, respectively, the above-mentioned deeds of trust were canceled by the payment of the amounts loaned thereon; that she was enabled to make these payments by reason of having received a legacy from her uncle, who died in June, 1892; that although this property was valued at \$7,393.14 in 1893, at present it will not sell for more than \$4,000; that the only income which she had ever received from any source was \$192 per year as rent from house before mentioned; that in February, 1898, she transferred both pieces of property to her two sons for a nominal consideration, and that she did this for the reason that she found it impossible to either sell or improve the property without great loss; that she now owns nothing and has no income and is absolutely without means of support.

On June 21, 1893, the special examiner reported that the claimant owned an undivided one-half interest in a house and lot No. 426 H street NW., Washington, D. C.; that the house was a three-story frame, and lot 18 by 100 feet, and worth from \$3,000 to \$4,000; that the rental value of the property was \$25 per month, but claimant alleged that she only received \$15 per month, and claimed that she only had one-third interest. The examiner further reported that claimant was a legatee to the extent of \$4,000 under a will probated in Washington, D. C., October 7, 1892.

On February 27, 1894, claimant testified before a special examiner that she owned a one-third interest in the property where she then resided, No. 426 H street NW., in this city; that this was all the real

estate she owned; that it was valued at about \$4,000; that she owned personal property to the amount of about \$60, which was all the personal property she owned; that there was a mortgage of \$2,000 on the house and lot No. 426 H street NW.; that the property was willed to her brother and herself, and her two sons purchased her brother's interest for \$1,800; that on reflection her interest must be one-half; that she received the \$2,000 mortgage and the same went to pay her debts, and that she had none of that money left. She further testified that she only got \$12 per month income, which comes from the rent of two rooms, which was all the income she received from all sources, except that her boys helped her; that she had all the rents and profits accruing from the property. She further testified that her uncle, Joseph A. Smith, died June, 1862, and that she was to receive a part of her mother's share of his estate; that she had no idea what her share of the estate would be, but expected about \$4,000.

She further testified as follows:

Yes, sir; I have received some money from the estate of Joseph A. Smith. I have received \$3,000, which I have turned over to Attorney Enoch White, who is acting for the family (my brothers and myself). I invested \$3,000 in a lot of land, which is situated on B street SE., Washington, D. C. Yes, sir; I invested every cent of the \$3,000 in that lot. I mortgaged my house some time in May, 1893, in order to secure this lot. I did this as I thought the lot was cheap. I thought I would get my share from the estate of Joseph A. Smith about this time, but as I did not I took this course to secure this property. * * * I think my share, when the estate is settled, will bring me a balance of about \$1,000.

Question. How is it that you stated in the first part of this deposition that all the real estate you owned in the world was a one-half interest in the property where you now live?

Answer. I did not think about this lot when you first began to question me. I own no other real estate in the world.

Three days later, or on March 2, 1894, claimant further testified before the special examiner as follows:

Question. How much money did you receive as a legacy from the estate of the late Joseph A. Smith?

Answer. I received \$4,000.

Question. Didn't you state, when I was here on the 27th of February, 1894, that you only received \$3,000?

A. Yes; I did. The reason I made that statement was because I only received \$3,000, while the other \$1,000 is in the National Metropolitan Bank awaiting final settlement of the estate. I felt really it was not mine. I did not receive the \$4,000 all at once, but only a part at a time. I received the \$3,000 in the fall of 1893, and the balance of \$1,000 a month or two ago.

Question. Did you not pay about \$4,200 for the property on Capitol Hill?

Answer. Yes; I paid something over \$4,000, but the exact amount I can not remember.

Question. What did you do with the \$4,000 legacy you received from the estate of Joseph A. Smith?

Answer. I cleared up the note of \$3,000 on the lot on Capitol Hill, which I now own clear. The balance of \$1,000 is on deposit in the National Metropolitan Bank in this city.

Question. Did you not use \$2,000 of said legacy to pay off mortgage on the H street property?

Answer. No, sir; I did not. I still owe the mortgage of \$2,000 on said property.

Question. Is not said H street property recorded in your name; and, as a matter of fact, is it not entirely your own?

Answer. Yes; this property is recorded in my name, but my sons have a \$1,200 interest in same and there is still a balance due my brother, John S. Franklin, of \$300.

Question. Where did you get the money to purchase the lot on Capitol Hill?

Answer. I first borrowed \$400 to seal the bargain. Then right after I mortgaged this property on H street NW. for \$2,000 I cleared up the \$400 that I borrowed, and paid out of the mortgage considerable more money at the time the deed was passed. I was so sick at the time I can not state the amount my son, Dr. Douglas, paid on the lot. He attended to the business for me.

Question. Did you not have a balance left from said mortgage?

Answer. Yes; but it was all paid out to pay my debts, except \$250, which is deposited in the Second National Bank, on Seventh street, Washington, D. C. This I draw on to pay taxes, etc. It draws no interest.

Question. With what other bank do you have an account?

Answer. As I stated before, an account with the National Metropolitan Bank of \$1,000. This is all the money I have in the world except \$15, which is on interest in the Union Savings Bank, Washington, D. C.

George H. B. White, cashier of National Metropolitan Bank, testified before the examiner, February 28, 1894, that he paid claimant and she received a specific legacy of \$4,000 within the past three or four months; that she would receive more when the estate is finally settled, but could not state the amount, and that she then had \$1,000 on deposit in said bank.

James F. Douglas, a son of claimant, aged 33 years, testified in an affidavit, September 16, 1898—

That said claimant is absolutely without independent means of support, and that she is now and for three or four years last past has been dependent upon affiant for maintenance and support, having during most of this period been afflicted with a severe form of articular rheumatism, which rendered her helpless and unable to earn her own livelihood.

Claimant filed with her appeal a letter from the deputy recorder of deeds of Washington, D. C., stating that the records of said office showed a deed from claimant of the H street property to William Howard Douglas and of the Capitol Hill property to James F. Douglas; that said deeds bear date February 15, 1898, and were recorded on the 17th of February, 1898. This letter fails to state the consideration named in the deeds, but claimant states that it was nominal—\$20; that the reason for the conveyance was that owing to business depression she was unable to sell, and in the hope that her children might be benefited thereby she transferred all of her said real estate to them for a nominal consideration of \$20; and that having shown that said property owned by her, and also having proved that said property is now no longer in her possession, and that she received no return for it—in fact, gave it away—it will be readily perceived that the charge that she has “other means of support than her daily labor” is without foundation.

The pensionable status of a widow as prescribed by section 3 of the act of June 27, 1890, is, that her husband shall have died leaving her "without other means of support than her daily labor," and that she shall have married her said husband prior to the passage of the act.

By the phrase "means of support" is meant all those resources such as lands, goods, or other sources of income from which the wants of life may be supplied, and the act eliminates only the "daily labor" of the widow. See cases of Eveline Holtzworth (7 P. D., 48); Ann F. Pinckley (8 P. D., 446).

As stated in the Pinckley case, if the widow has resources from any other source than her daily labor from which the wants of life may be supplied she is not dependent within the meaning of this statute, regardless of whether any income is or is not derived from unproductive property; that it was evidently not the intention of the law to pension those who owned property which could be made to afford a support, in order that the property might be preserved intact during the life of the claimant and pass undiminished to her heirs or devisees; that such a rule would enable widows, who by investing their money or converting their productive property into wild or unproductive lands, stocks, or noninterest or nondividend-paying investments, could thus deprive themselves of any income, regardless of the amount or value of their "means of support."

In the case under consideration the evidence clearly shows that claimant was not left without other means of support than her daily labor. She was left at the death of soldier with means of sufficient value to enable her to borrow \$2,000 on the security of her interest in her house and lot on H street, and \$400 on her note, with which to purchase additional real estate. Her real and personal estate in 1893 is shown to exceed \$6,000, and it is not within her power to create a pensionable status by voluntarily conveying her property to others for a mere nominal consideration, thus seeking to deprive herself of the very means of support which she possessed at the date of the death of her husband for the purpose of bringing herself within the letter of the act of June 27, 1890.

She can no more create a pension against the Government by such a transfer of her property than she could defeat the right of a judgment creditor by a like or similar disposition of her property liable to execution. Such conveyances stand upon the same footing as voluntary conveyances for the purpose of defrauding creditors so far as the Government is concerned, and the grantor will not be permitted to profit at the expense of the Government by the transaction.

In this case the voluntary conveyance of all her real estate was made February 15, 1898. On the next day she executed her application for restoration to the rolls, which was filed February 17, 1898, the same day that her deeds were presented for record.

I am clearly of the opinion that claimant is not without other means of support than her daily labor, within the meaning of the act of June

27, 1890, nor can she acquire a pensionable status by voluntarily depriving herself of her means of support, and the action appealed from is affirmed.

The papers in the case are herewith returned.

DISLOYALTY—ACT JUNE 27, 1890—ALIENS.

HENRY MACKRILL, ALIAS MACKEY.

Aliens who aided and abetted the late rebellion against the authority of the United States are not entitled to pension under the act of June 27, 1890. Their title is barred by the provision of section 4716, Revised Statutes.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
December 31, 1898.*

On December 4, 1897, an appeal was entered from the action of the Bureau in the claim for pension under the act of June 27, 1890, of Henry Mackrill, landsman, United States ship *Sabine*, United States Navy.

The appellant, July 24, 1890, filed a claim for pension under the act of June 27, 1890; it was allowed, and pension was paid him at \$12 per month from date of filing declaration to September 23, 1895, when his name was dropped from the rolls.

His name was dropped from the rolls upon the ground that he aided and abetted the late rebellion against the authority of the United States.

The claimant served in Company D, Ninth Mississippi Infantry, Confederate army, from April 11, 1862, to November 25, 1863, when he was captured by the Federal forces. He enlisted in the United States Navy on January 23, 1864. There is no contention as to his service in the Confederate army, and according to his own statement said service was voluntary.

Section 4716, Revised Statutes, provides that—

No money on account of pension shall be paid to any person or to the widow, children, or heirs of any deceased person who in any manner voluntarily engaged in, or aided or abetted, the late rebellion against the authority of the United States.

The claimant was notified that his name was dropped from the rolls upon the ground of "disloyalty," and considerable stress is laid upon the fact that he was a British subject at the time he was serving in the Confederate army. It is manifest, however, that under the statute cited it is immaterial whether or not he was a citizen of the United States while he was engaged in aiding and abetting the late rebellion against its authority. The act includes in express terms all persons who were so engaged, regardless of their citizenship, and, therefore, this appellant.

It is further contended that section 4716, Revised Statutes, does not operate to bar this appellant from receipt of pension under the provision of the act of June 27, 1890. The question involved was recently

decided and discussed at considerable length in the case of George W. Gilbert (9 P. D., 279). It was there held, in substance and effect, that a person who voluntarily aided and abetted the late rebellion against the authority of the United States is not entitled to pension under the act of June 27, 1890, his title being barred by the provisions of section 4716, Revised Statutes.

From a review of the proceedings no error is found. The action of the Bureau in dropping the appellant's name from the rolls under the act of June 27, 1890, upon the ground assigned, was proper.

PRACTICE—COMMENCEMENT—ACT MARCH 6, 1896.

PRESTON M. ROHN.

"Whenever a claim for pension under the act of June 27, 1890, has been, or shall hereafter be, rejected, suspended, or dismissed, and a new application shall have been, or shall hereafter be, allowed in such claim, such pension shall date from the time of filing the first application, provided the evidence in the case shall show a pensionable disability to have existed, or to exist, at the time of filing such first application," whether claimant has invoked the aid of the act of March 6, 1896, or not.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
December 31, 1898.*

I have the honor to acknowledge receipt of your communication of the 20th instant, returning the papers in the appealed claim, certificate No. 954126, of Preston M. Rohn, late of Company F, Forty-seventh Pennsylvania Infantry, together with my decision of the 13th instant, in said claim, in which I hold that no formal application for the benefit of the act of March 6, 1896, is necessary in claims adjudicated subsequent to the passage of that act, and requesting to be advised whether it is the intention by this decision to abrogate the practice laid down on page 97 of the "new practice," approved by the honorable Secretary of the Interior April 9, 1898, which reads as follows:

SEC. 12. Where a claim, under the act of June 27, 1890, has been rejected on the ground of no ratable disability, and the claimant files a new declaration, alleging the same disabilities set forth in his prior application, or additional disabilities not heretofore alleged, a new medical examination may be ordered. If a ratable disability is found on such examination, the claim should be adjudicated under such new declaration in the same manner and under the same rules as if no previous application had been filed. If, however, the claimant sets forth in such new application that an injustice was done him in rejecting his claim under the prior application, and furnishes competent evidence to show that fact, the adjudication of the claim will be governed by the provisions of the act of March 6, 1896.

I have given this subject careful reconsideration and am constrained to adhere to my decision. I do not see that this decision necessarily conflicts with the rule of practice referred to. The rule, as stated, is incomplete and limited in its scope. It applies strictly only to cases

where the medical examination under the second claim shows a pensionable degree of disability, and has no application to those cases wherein the claimant died after filing such second claim and before medical examination thereunder; or to cases wherein the medical examination made fails to show a pensionable degree of disability, but the ex parte evidence filed in the case does show such degree of disability existing; or to cases where the medical examination made shows a pensionable degree of disability then existing, and the ex parte evidence filed shows such degree of disability existed continuously from the date of filing of a former claim.

The rule as stated in the "new practice" does not seem to cover the equities, nor even the legal rights, of these last three cases. Where a claimant files no evidence, under a subsequent claim, tending to show the existence of a pensionable degree of disability under the act of June 27, 1890, from the date of filing of a prior claim, but confines his proof to the subsequent claim alone, the adjudication of the subsequent claim may properly be confined likewise to that claim, and the claim treated "as if no previous application had been filed," as the rule cited by you states.

But where such claimant files, under his subsequent claim, evidence which tends to establish a pensionable condition, under said act of June 27, 1890, from the date of filing of a prior claim, the intent of the act of March 6, 1896, certainly and clearly is that such evidence should be considered in connection with all the other evidence in the case under both the prior and the pending claims, and if a pensionable degree of disability under the act of June 27, 1890, is thus established as having existed from the date of filing of the prior claim, that pension should be allowed accordingly from the date of filing the first application, "anything in any law or ruling of the Department to the contrary notwithstanding," as the act of March 6, 1896, expressly states, and as my decision states, "notwithstanding any failure to distinctly claim allowance from such date."

To require, in such case, that the claimant shall, after having proven a pensionable condition to have existed from the date of filing of the first claim, file an application specially asking the benefit of the act of March 6, 1896, would subserve no good purpose whatever.

The declaration under the act of June 27, 1890, has already, in such case, made the necessary allegations as to the character of the pensionable disabilities under that act, and the evidence adduced by the claimant, and by medical examinations, has shown that such disabilities existed at the time the first claim was filed, and in a ratable degree at that time. The equities in such a case are certainly in favor of allowance of the pension from that date accordingly, for all the essentials of allegation and proof exist; and the act of March 6, 1896, expressly requires that the pension allowed in such case shall be from that time.

I can not but reaffirm, with emphasis, that the act of March 6, 1896,

establishes a rule of practice, merely, under the act of June 27, 1890, and was evidently intended to give to claimants under the latter act its full benefits, without regard to technicalities in practice; that it does not, in terms, make its operation dependent upon filing any application specially asking that it be given effect, but, on the contrary, is in terms mandatory upon the Department, directing and requiring that pension "shall date from the time of filing the first application," on proof of existence at that date of a pensionable degree of disability under the act of June 27, 1890, "anything in any law or ruling of the Department to the contrary notwithstanding."

Neither the Commissioner of Pensions nor the Secretary of the Interior may limit the rule thus established by direct act of Congress. The Department is expressly precluded by the terms of the act from interfering in any way with its operation as a remedial statute, manifestly designed to carry out, for the claimant's benefit, the liberal provisions of the act of June 27, 1890. It enjoins the Department, mandatorily, to allow pension solely upon the proof and allegations made under the act of June 27, 1890; and such mandate may not be disobeyed or rendered ineffective by departmental regulations.

I am, therefore, of the opinion that any practice of your Bureau which conflicts with the operation of the act of March 6, 1896, as above construed, is erroneous, and should be abandoned as unwarranted and contrary to law.

MARRIAGES OF SLAVES—LEGITIMACY—SECTION 4705.

MINORS OF WILLIAM TOLLER.

Only the minor children of a colored soldier by the woman with whom he lived in the relation of husband and wife up to the date of his enlistment, or to the date of his death if he died subsequent to his service, are entitled to a minors pension under section 4705, Revised Statutes.

Assistant Secretary Webster Davis to the Commissioner of Pensions, January 9, 1899.

The minors of William Toller, deceased, late private, Company F, Fifth United States Volunteer Cavalry, by their attorneys, filed a motion for reconsideration of departmental decision of December 22, 1893 (7 P. D., 545), affirming the Bureau action June 21, 1888, rejecting their minors' claim No. 505829 (widow's certificate No. 233480), filed September 27, 1877, on the ground that they were not the legitimate children of the soldier, he having subsequent to the date of their birth and prior to enlistment, when both he and claimants' mother were slaves, married Ellen Toller, who was also a slave, by a ceremony deemed by them obligatory, were recognized as man and wife, and lived together as such to the date of enlistment, under the provisions of section 4705, Revised Statutes; that Ellen Toller, who was pensioned

under certificate No. 159260 and died May 1, 1888, must be recognized as having been the legal widow of the soldier.

It is contended on behalf of claimants that—

The question in this case is whether children of a colored soldier by a woman who was not living with him as his wife at the date of his enlistment or death, but who was joined in marriage to him by a ceremony deemed by them obligatory, are entitled to pension as his minor children.

The decisions upon this question have not been uniform. The first decision was that such children are legitimate, and entitled to pension (minors of Samuel Statesman, 2 P. D. (o. s.), 345). This was reversed by Assistant Secretary Hawkins in the case of the children of Peter Williams (2 P. D., 383). This decision was in turn reversed, and the old ruling affirmed, by Assistant Secretary Bussey in the case of the children of Joseph Crain (4 P. D., 358); reaffirmed in the cases of Emily Latham (5 P. D., 170) and John Pendleton (*ibid.*, 217). The decision of December 22, 1893, in the case at bar, overruled the latter cases, and held that the children were not entitled.

There is little to be said on the question that has not heretofore been said. The decision in the case of Crain (above) was exhaustive, and your attention is respectfully invited thereto. The joint resolution of March 3, 1885, now embodied in section 2037, Revised Statutes, seems to have been wholly overlooked in the discussion of this question. Presumably it was intended to fix widowhood and legitimacy of colored persons in all matters in which the United States was concerned growing out of the military service of colored soldiers. It recites:

"SEC. 2037. In determining who is the wife or child of any colored soldier, within the meaning of this title, evidence that the soldier and the woman claimed to be his wife cohabited or associated as husband and wife, and so continued to cohabit or associate at the time of enlistment, or evidence that a form of marriage, whether such marriage was authorized by law or not, was entered into by them, and that the parties thereafter lived together as husband and wife, and so continued to live together at the time of the enlistment, shall be deemed sufficient proof of marriage; and the children born of any such marriage shall be taken to be the children embraced within the provisions of this title, whether such marriage was or was not dissolved at the time of the enlistment."

This statute concerns the same persons as section 4705 relates to, and is almost identical in terms, except that it expressly embraces children of a marriage which may have been dissolved at the time of the enlistment. Inasmuch as the same construction of section 4705 would not violate its terms, and would admit to pension children of former marriages of colored soldiers in the same manner as children of former marriages of white soldiers, thereby creating and sustaining an equality under the laws, and as prior to 1889 (Williams decision) it was so construed, we believe it would be proper and consistent to overrule the decision of December 22, 1893, herein, and admit this claim.

Soldier enlisted September 16, 1864, and died in service April 5, 1865. The additional facts in the case are stated in the published decision (7 P. D., 545).

Section 2037, Revised Statutes, which was originally joint resolution No. 29, affirmed March 3, 1865 (13 Stat. L., 571), was repealed by implication, so far as it applied to pension claims, by section 4705, Revised Statutes (sec. 11 of the act of March 3, 1873, 17 Stat. L., 570).

But even assuming that said section 2037 is still in force as a rule in pension cases, it does not appear how said section can affect the present construction of section 4705, Revised Statutes, as construed (7 P. D., 545), as the phraseology of section 2037 is even more expressive than

that of section 4705 in determining the marital status at the time of enlistment, that phrase being repeated as applicable to the case where the evidence of marriage consisted of a form of marriage, as well as where the only evidence of marriage consisted of cohabitation and repute only. In each case the marital cohabitation, in order to establish a valid marriage as a basis for any claim against the Government growing out of the soldier's service, must have continued and existed "at the time of the enlistment."

Section 4705 substantially reenacted the provisions of section 2037, and the phrase "and lived together as such up to the date of enlistment," in section 4705, applies equally to those "parties that were joined in marriage by some ceremony deemed by them to be obligatory" and to those parties who were not joined by any ceremony, but who—

habitually recognized each other as man and wife, and were so recognized by their neighbors, and lived together as such.

In both cases the time that the marital relation subsisted must be shown to have continued up to the date of enlistment, when such soldier died in the service, or if otherwise, to date of death—that is, death of the soldier after his discharge from the service.

It is the children of such marriages only that are held to be lawful children of such soldiers, for pensionable purposes, under said section 4705, and when the Bureau held that the claimants in this case were not the legitimate children of the soldier, it only passed upon the question of legitimacy so far as it involved their legal right to a pension as the children of the soldier.

In the case of the minors of Samuel Statesman (2 P. D., o. s., 345), cited by claimant, Secretary Delano held, February 17, 1875, that where the wife of a colored soldier died before his enlistment his children were entitled to a minor's pension under section 4705. In order to reach this conclusion it would be necessary to hold that the phrase "to date of death," in said section 4705, referred to or included the death of the wife; but a mere reading of the context shows that the soldier only is meant, the language being—

and lived together as such up to date of enlistment, when said soldier died in the service, or if otherwise to date of death.

Death of whom? Clearly the death of the soldier, and no one else. In the Statesman Case and the case of Joseph Crain it was held that the widow who would be entitled to a pension under section 4705 must be the one who continued to live with soldier as his wife to the date of his enlistment, or death, if he died after service. It is the children only of such a marriage that are held to be his lawful children under said section. How, then, the conclusion can be reached that the minor children of a marriage that can not be proved to be a legal marriage under said section 4705 can be entitled to a minor's pension under said section does not clearly appear. Certainly the voluminous discussion contained in the Crain Case affords no light on the subject.

It is only "the children born of any marriage so proved" who are declared to be the lawful children of the soldier; and the marriage which is required to be so proved is the marriage that resulted in uninterrupted marital cohabitation to the date of the soldier's enlistment in case he died in the service, or continued up to the date of his death, where he did not die until after the termination of his military service.

I am of the opinion that the decisions in the cases of minors of Samuel Statesman (2 P. D., o. s., 345), Joseph Crain (4 P. D., 358), Emily Latham (5 P. D., 170), and John Pendleton (*ibid*, 217), were based upon an erroneous and unauthorized construction of the law, and that the law was correctly construed in the cases of Peter Williams (2 P. D., 383), and case under present consideration (7 P. D., 545).

It is only the minor child or children of a colored soldier by the woman with whom he lived in the relation of husband and wife up to the date of his enlistment, or to the date of his death if he died subsequent to his service, who are entitled to a minor's pension under section 4705 Revised Statutes.

The motion for reconsideration is accordingly overruled, and the former departmental decision of December 22, 1893, is reaffirmed.

PRACTICE DECLARATION.

ELIZA R. MONG (MOTHER).

It is held that the Bureau erred in treating a declaration which did not specify under what law it was filed as a declaration under the general law without explaining to the claimant the benefit of applying under the act of June 27, 1890, and giving her an opportunity to intelligently amend her declaration.

Assistant Secretary Webster Davis to the Commissioner of Pensions, January 14, 1899.

I have considered the appeal filed September 6, 1898, from the action of your Bureau adverse to the claim of Eliza R. Mong, who seeks pension as dependent mother of Martin L. Mong, deceased, formerly a sailor in the United States Navy. The case has been made special on account of claimant's advanced age and physical condition.

It appears that Martin L. Mong enlisted as a "landsman" on the 3d of May, 1879, and died in the service of disease contracted in the line of duty on September 8, 1879, leaving no widow or child. His mother filed a declaration on July 13, 1897, which, she stated, was for the purpose of obtaining "the pension provided by acts of Congress granting pensions to dependent relatives." Said declaration was treated by your Bureau as an application for pension under the provisions of section 4707 of the Revised Statutes, and was rejected in August, 1898, after a special examination, on the ground that she was not shown to

have been dependent upon the sailor for support at the time of his death. From that action the appeal is taken, the contention being that—

It has been shown by the testimony of disinterested persons that for two years or more prior to the death of her son (the sailor) he contributed to claimant's support, and that such contribution to her support was needed and used by her at that time.

After careful consideration of the evidence, I am satisfied that the claimant was not dependent upon the sailor for support at the time of the latter's death. Her husband was then only about 60 years old, and in good physical condition for a man of his age. He owned about 10 acres of land, with a dwelling house thereon, and a tanyard, the value of the whole (including the stock in the tanyard) being in the neighborhood of \$3,000. His business was apparently prosperous, and it is evident, from all the testimony, that in 1879, and for some years thereafter, he was able to and did give the claimant a comfortable support. Assuming that the claim was one under the conditions and limitations of section 4707 of the Revised Statutes, the action of your Bureau was proper, and must be affirmed. I am of the opinion, however, that your Bureau erred in treating the claim as one under section 4707, Revised Statutes.

The declaration was ambiguous. It stated that its purpose was "to obtain the pension provided by acts of Congress granting pensions to dependent relatives." No particular acts were specified. It would, it seems to me, have been reasonable to hold that the intent was to claim the benefit of all the laws then in force granting pensions to dependent relatives, including the first section of the act of June 27, 1890.

To this it may be objected that the claimant stated in her deposition before your special examiner, in August, 1898, that she was claiming pension under the "general law." But it is a general rule that a declaration can not be explained, qualified, or amended by a statement before a special examiner. The special examiner in this case was not directed to inquire under what law the claim was made. He was not required to, and probably did not, report the exact language of the appellant in describing her claim. It may be doubted whether she used the words "general law" or, if she did, whether she intended to use them in the sense in which they are used in the Pension Bureau, i. e., as distinguishing the other general statutes relating to pensions from the act of June 27, 1890.

The advantage to the dependent mother or father of an enlisted man, in claiming under the act of June 27, 1890, rather than under the old law, is so manifest that it is hardly conceivable that one would apply under the latter if fully acquainted with the provisions of both laws. There is every reason, it seems to me, why the declaration in such a case should be held to be one under the act of June 27, 1890, wherever it can be done consistently with the language employed. At any rate, the propriety of making the claimant fully acquainted with her rights, before putting her to the unnecessary expense and delay incident to the

prosecution of the claim under the old law will hardly be questioned. Anything in the nature of "snap judgment" on the part of the Government in dealing with its defenders and their dependents is to be carefully avoided.

In the instructions relative to declarations under the act of June 27, 1890, promulgated July 28, 1897, it was provided that if a declaration should fail to show upon its face, with certainty, that it was intended as a claim for the benefits of the act of June 27, 1890, the claimant may make it certain by means of a supplemental affidavit which shall be read in connection with and as a part of the original application.

This rule was made with particular reference to claims under the second section of the act of June 27, 1890, but there is no reason why it should not apply to claims under the other sections.

The rules governing the practice of your Bureau permit a person who has filed a claim as dependent parent which is plainly and unequivocally a claim under the old law to have it treated as a claim under the act of June 27, 1890, by simply filing a request in writing for that purpose before final action is taken. (Treatise on the Practice of the Pension Bureau, p. 117, par. 2.) The claimant filed such a request on October 27, 1898, but no attention was paid to it, as final action on the claim had already been taken.

It may be questioned whether it would not be better to treat every application filed by a dependent parent of an enlisted man (not a commissioned officer) since the passage of the act of June 27, 1890, as an application under said act, as the rate and date of commencement of the pension would be the same as under the old law and the trouble and expense of proving the claim much less. But without going to that extent I am of the opinion that every such claimant who files an application which is either plainly or inferentially an application under the old law should, before he or she is required to furnish evidence, have the benefits and requirements of both laws fully explained and be given an opportunity to state under which law he will proceed. A circular for this purpose can readily be prepared. As no such information or opportunity was given to the claimant in this case, the rejection of the claim is set aside and the claim remanded for readjudication.

EVIDENCE—RECORD—ADMISSIONS—ESTOPPELS.

EDMUND R. NEWHARD.

The record, based on claimant's own statement in writing, shows that the disability alleged, disease of heart, existed prior to his enlistment; claimant can not contradict this record, even though his statement be false; case of John H. Ruhl (8 P. D., 351).

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
January 16, 1899.*

The appellant and claimant in this case, Edmund R. Newhard, late captain Company K, Fifty-fourth Regiment Pennsylvania Volunteer

Infantry, certificate No. 510008 (under the act of June 27, 1890), filed his declaration under the general law February 15, 1879, alleging that within said service and line of duty at Richmond, Va., while a prisoner of war, he became debilitated, resulting in disease of heart.

The claim was rejected by action of the Bureau February 14, 1880, on the ground that alleged disease of heart existed before entering the service.

Claimant was pensioned under the act of June 27, 1890, at \$12 per month, from July 3, 1890 for disease of heart, curvature of spine, deformity of chest, vertigo, malnutrition, and general debility.

The claim under general law was reopened for special examination October 12, 1897, and after special examination was again rejected by action of the Bureau May 14, 1898, on the ground that the alleged disease of heart existed prior to enlistment, as shown by the record of the War Department, and claimant is unable after special examination to furnish satisfactory evidence to overcome the adverse record.

Claimant appealed from said last action October 27, 1898, his contention being that said action was error; that the evidence filed and taken by special examination shows that he was sound at enlistment; that his statement as to prior disability at the time of his resignation and discharge had been overcome by the evidence, and the claim should have been approved and allowed.

Claimant enlisted November 24, 1861, and was honorably discharged, after tendering his resignation, September 4, 1863. He was taken prisoner in October, 1862, and was confined in Libby prison, Richmond, Va., until some time in December following, and he alleges that from exposure, etc., while in prison he became greatly debilitated, resulting in disease of heart.

The records of the War Department show that June 22, 1863, claimant tendered his resignation in the following letter, signed by him:

With regret I am compelled to announce to you my failing health, caused by a pain in my left breast and short breathing, which unfits me for field duty. I had an attack of the same nature five or six years ago. While stationed at North Mountain, Virginia, last winter the complaint again made its appearance, and is apparently on the increase. I therefore respectfully tender my resignation, in order that the position I hold may be better represented.

This statement is corroborated by the regimental surgeon in the certificate of disability, that he claimed the existence of the disability prior to his military service.

June 13, 1890, claimant executed an affidavit, in which he states:

That in September, 1863, he was anxious to return home to his family, and therefore in his resignation he alleged falsely that he had been affected as stated in his letter of resignation at the time of his enlistment; that his resignation was not accompanied by an affidavit.

Claimant filed testimony tending to show that he was a sound, healthy man prior to his entering the service, and the testimony taken by the special examination of some sixteen witnesses, neighbors of claim-

ant, at Allentown, Pa., February, 1898, tends also to show that claimant was perfectly sound prior to enlistment.

But this testimony, taken thirty and thirty-seven years after his enlistment, should not be allowed to contradict the record made on claimant's own statements in 1863.

Claimant does not dispute the fact of the record or contend that he did not write and sign the letter of resignation.

In the case of John H. Ruhl (8 P. D., 351), the Department decided:

When a soldier has procured his discharge by reason of his own false statements, which statements are recited in his certificate of discharge, he will not be allowed in a pension claim to deny the truth of these statements, but he may attack the fact that he made such statements, since fraud or mistake on the part of those who made the record are always open to proof.

In this case claimant does not deny the fact that he made such statements, but attempts to get a pensionable status by claiming that his statements made, on which he based his resignation, were false, and not under oath.

This fact can not avail claimant. Claimant is now 79 years of age, disabled, and shown to be in need of larger pension than he is now receiving; but from the admitted facts in the case the Government has done the best it could for him under existing laws and the well-established rules of construction and practice of the Bureau and the Department.

The action of the Bureau rejecting the claim under the general law is therefore hereby affirmed, and the papers in the case are herewith returned.

DISCHARGE—ACT JUNE 27, 1890.

SUSAN WILLIAMS (WIDOW).

The deceased soldier was never discharged from his military service during the war of the rebellion, but was murdered while in the service under his first and only enlistment at a time when absent from his command on a pass.

Held: That his widow is not entitled to pension under the provisions of section 3, act of June 27, 1890.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
January 24, 1899.*

Susan Williams filed in your Bureau on September 3, 1890, an application for pension under the provisions of section 3, act of June 27, 1890, as widow of James Williams (deceased), late private, Company G, Eighty-ninth United States Colored Volunteer Infantry, which was rejected on July 29, 1891, upon the ground that the deceased soldier had never been discharged from his military service during the war of the rebellion.

From said action appeal was taken on October 27, 1897.

It is shown by the official military record of the deceased soldier's

army service, and the other evidence in this case, that he enlisted in the above-named organization on September 28, 1863, and served therein until his death in March, 1866. Just prior to his death he was serving on detached duty at the provost marshal's office in the city of New Orleans, and on the day before his death had just been paid off, and had been given a pass and granted a leave of absence to visit his wife and family, who resided in that city. He was found on the night of March 24, 1866, dead in the canal in said city, with his skull fractured, and was supposed to have been robbed and murdered.

The third section of the act of June 27, 1890, requires as a prerequisite to the grant of a widow's or minor's pension thereunder, that the soldier on account of whose service and death pension is claimed shall have served in the Army of the United States during the war of the rebellion for ninety days or more, and been honorably discharged from such service.

The facts in this case do not bring it within the scope and purview of the decision and holding of this Department in the case of Mary E., widow of Samuel H. Walker (7 P. D., 197).

In that case it was held that when a soldier had served a term of ninety days or more in the military service of the United States during the war of the rebellion, and had been honorably discharged therefrom, and afterwards reenlisted and died during his subsequent term of service, his death not being the result of a violation of any law, rule, or regulation of the military service, the requirements of the act of June 27, 1890, as to length of service and honorable discharge are fulfilled, and his widow is entitled to pension on compliance with the other conditions of said act.

In this instance the deceased soldier never received a discharge of any kind from any portion of his military service, but met his death while in the service under his first and only term of enlistment, and at a time, and under circumstances when he could not be considered as having been in the line of military duty.

I am of the opinion that his death under such circumstances could not be held to be equivalent to an honorable discharge from his military service, such as is contemplated and required by the provisions of section 3 of the act of June 27, 1890, to give title to his widow to pension, and, therefore, the rejection of this claim upon the ground stated was not error, and is affirmed accordingly.

REIMBURSEMENT—FRAUD AND MISTAKE—SECTION 4715, R. S.

SAMUEL B. WEEKS.

Pensioner having drawn two pensions for the same period of time, in contravention of the provisions of said section, and the Bureau having taken steps to secure reimbursement of the amount illegally paid by withholding all pension until the overpayments are recovered, it is held that such action was proper, that it is a duty imposed by the law, and that the Department has no power to afford the pensioner relief by revoking the action or annulling the requirement of the statute.

Assistant Secretary Webster Davis to the Commissioner of Pensions, January 24, 1899.

Samuel B. Weeks, survivor of the Mexican war, and late private Company L, Ninth Indiana Cavalry, was pensioned April 24, 1889, on account of his service in the war with Mexico, at the rate of \$8 per month from January 29, 1887. While drawing this pension he filed, July 22, 1890, a claim for pension under the act of June 27, 1890, on account of the other service above mentioned. In said application he stated that he was a Mexican-war pensioner, and gave the number of his certificate (15143). This claim under the act of June 27, 1890, was allowed May 18, 1891, at the maximum rate (\$12 per month) under said act. The certificate (No 581146) for this pension was issued, and notwithstanding the allegations of the pensioner, no provision was made in the adjudication for withholding the Mexican-war pension or for dropping his name from the rolls as such pensioner. In consequence he was allowed to draw both pensions for the same period, beginning July 22, 1890, in violation of the provisions of section 4715, Revised Statutes, which are as follows:

Nothing in this title shall be so construed as to allow more than one pension at the same time to the same person or persons entitled jointly; but any pensioner who shall so elect may surrender his certificate and receive in lieu thereof a certificate for any other pension to which he would have been entitled had not the surrendered certificate been issued. But all payments previously made for any period covered by the new certificate shall be deducted from the amount allowed by such certificate.

Pensioner continued to draw both pensions to February 4, 1898, but it appears that when the next quarterly payment became due he failed to send a voucher for the Mexican-war pension. Thereupon, or some little time afterwards, the pension agent at Topeka, Kans., made inquiry of the postmaster at Phillipsburg, Kans., pensioner's place of residence, as to why the voucher for the pension under the Mexican-war certificate had not been sent. In response he was informed of the fact that pensioner had been drawing the two pensions, but declined further to receive the pension referred to, as he had learned he was not entitled to both. Notification was sent by the agent to the Bureau, and it was then for the first time that it was known two pensions were being paid to this pensioner. Thereupon action was taken looking to the

dropping of pensioner's name as a Mexican-war pensioner and the recovery of the overpayments made to him as such. As a preliminary step to this end, notice was sent to him, as required by law, to show cause why such action should not be consummated. He made a reply explaining his position in the matter, and pending further action in the Bureau he has filed, January 16, 1899, an appeal or protest against the withholding of his pension under the act of June 27, 1890, for the purpose of reimbursing the Government for the amount illegally paid.

In the pensioner's statements in response to the notice from the Bureau, and in support of his appeal, he sets forth the reasons for drawing both pensions at the same time, as follows:

That at the time of making application for pension under the act of June 27, 1890, he believed that he was entitled to a pension for each service, and was so advised by many of his friends, with whom he freely conversed about making said application, some of them being persons whom this affiant fully believed to be learned in the laws relating to pensions; that he acted in the utmost good faith in making said application, and with no intention or desire to defraud the Government, having plainly stated in said application that he was then a pensioner under the laws relating to soldiers of the Mexican war; that when said pension was allowed under the act of June 27, 1890, and subsequently, he has made no concealment of the fact, but, to the contrary, has given it the widest publicity, executing the vouchers for both pensions at the same time and before the same official; and said vouchers were sent in together and paid at the same time and by the same pension agent; that the action of the Pension Department in granting the said pension, after information had been furnished by this affiant that he was already being carried on the pension rolls under the laws relating to soldiers of the Mexican war, and the subsequent and unquestioned payment of both of the said pensions by the same pension agent, thoroughly convinced this affiant that he was legally entitled to the same; that about April 1, 1898, this affiant was first informed that it was contrary to the laws relating to pensions for any person to receive payment for more than one pension covering the same period; that immediately on receiving such information this affiant discontinued the execution of his voucher for pension as a soldier of the Mexican war; that in all matters pertaining to the said pensions, both as a soldier in the Mexican war and the war of the rebellion, this affiant has at all times acted in good faith and in accordance with his best information and judgment, without any intention to defraud the Government of the United States.

This statement, in so far as it shows that pensioner acted in good faith and with no desire to defraud the Government, and in ignorance of the law on the subject, is corroborated by others who have known him many years, and who vouch for his honesty, good habits, and respectability. These further state also, in corroboration of pensioner's plea for not having his pension withdrawn entirely, that he is nearly 70 years old, has an aged wife to support, is unable to earn a livelihood by his own labor, and is without other means of support than the pension he has been drawing; that to withhold all of his pension money for the time that it will take to reimburse the Government will probably cause him much distress, if he does not have to go to the poor-house, and that by the time he can begin drawing his pension again he or his wife, or both, may be dead.

It is apparent that there are some unpleasant features connected

with the execution of the duty imposed by the law in this case. It is also plain that the larger portion of the blame for this state of affairs attaches to the Bureau, or to those officials who had a part in the adjudication of the claim under the act of June 27, 1890, and they are chargeable with gross carelessness and dereliction in not taking cognizance of the fact that pensioner was already receiving the pension as a Mexican war survivor, and in not ordering the suspension of payment of that pension, from the time the other commenced. The pension agent was also much at fault for paying the two pensions so long without discovering the illegality, as it is stated that the vouchers for both were executed before the same officer at the same time and forwarded together. But the pensioner himself is not exonerated, notwithstanding he may have been conscientious, because ignorance of the law excuses no one from the consequences of his act in violation of law, however honestly he may believe he is acting within the law. Pensioner certainly had his attention drawn to this matter, and if he was misinformed as to his rights it is his misfortune.

It should be clear, too, that whatever the consequences may be, and whoever is at fault for this overpayment of pension in contravention of the statute, the error should be rectified as far as possible, and it can not be expected that the Government should lose the amount illegally paid. And although it may work a hardship to the pensioner, it is the duty of the Bureau to secure reimbursement of the amount thus overpaid. The Department has no authority to relieve of this duty or remit the penalty, although its own officials may have been derelict in the first instance. It can only execute the law, and the statute already quoted makes it imperative that it shall see that only one pension to the same person is paid for the same period of time. This is in accordance with the uniform rulings in similar cases.

It may be remarked that since the duty of recovering the overpayments in this case is imposed by the law, the only relief that could be afforded the pensioner on the line he seeks and for the reasons stated by him and others would be through a special act of Congress for that purpose. As the matter stands he can not be permitted to draw either pension until the reimbursement for the overpayments has been made, and the action of the Bureau in this direction is proper and is sustained.

DISLOYALTY—SECTION 4716, R. S.—EVIDENCE.

MARY J. DUPRA (WIDOW).

The record shows that the soldier enlisted in the rebel army while a prisoner of war at Andersonville, and continued therein until captured by Union forces at Egypt Station, Miss., and that he was subsequently confined, with other rebel prisoners, at Alton, Ill., until March 17, 1865, when he enlisted in the Fifth United States Volunteers, which was made up of recruits from rebel prisoners.

Held, That the record not only fails to sustain the appellant's contention that his enlistment in the rebel army was involuntary and an expedient to enable him to return to the Union side, but is inconsistent with it, and the widow's pension was properly terminated.

Assistant Secretary Webster Davis to the Commissioner of Pensions, January 26, 1899.

I have considered the appeal filed April 23, 1898, from the action of your Bureau in dropping from the pension roll the name of Mary J. Dupra, widow of Moses Dupra, formerly a soldier in Company E, Ninety-ninth Regiment of New York Infantry.

It appears from the papers in the case that the said soldier enlisted in the above-named organization on the 23d of June, 1861, to serve three years; that he was captured by the enemy in action at Smithfield, Va., January 31, 1864; that while confined at Andersonville, Ga., he enlisted in the rebel army as a private in Company F, Tenth Tennessee Infantry; that he was recaptured by the Federal forces at Egypt Station, Miss., December 28, 1864, and confined as a prisoner at Alton, Ill., until March 17, 1865, when he enlisted in Company A, Fifth United States Volunteers (Rebs), in which he served until mustered out on individual muster-out roll July 3, 1866. He filed a claim for invalid pension on May 7, 1883, based on disability from diseases alleged to have been contracted while a prisoner at Andersonville. Said claim was rejected by your Bureau in May, 1884, on the ground that his enlistment in the rebel army rendered him ineligible to pension under the provisions of section 4716 of the Revised Statutes.

The soldier died on the 8th of July, 1891. His widow, on August 11, 1891, filed a claim under the act of June 27, 1890, which was allowed in March, 1893. On the 20th of April, 1893, she filed a claim under the old law, which was rejected in March, 1894, on the ground that payment of pension to her was inhibited by section 4716 of the Revised Statutes; and in December, 1897, after due notice, her pension under the act of June 27, 1890, was terminated for the same reason. In appealing from that action her attorney states that on April 15, 1897, he filed in the Pension Bureau an argument in favor of the allowance of the soldier's invalid claim in which he maintained that the soldier's service in the Confederate army was not "voluntary," and that his right to pension was therefore not affected by anything in section 4716 of the Revised Statutes; and that on June 26, 1897, he filed a protest against stopping or suspending the widow's pension under the act of June 27, 1890, until action had been taken on his said argument, filed April 15, 1897. To this protest, he says, no attention was paid. He contends that no action should have been taken in the widow's case until action had been taken on his argument submitted in the soldier's claim and notice given him of the decision, and an opportunity afforded for an appeal; wherefore he asks that the action dropping the widow's name from the roll be annulled and that the name be restored until action shall have

been taken upon his aforesaid argument and notice given him of such action.

The action dropping the widow's name from the pension roll was tantamount to a decision upon the attorney's argument in the invalid claim, being in effect an affirmance that the soldier's service in the Confederate army was "voluntary," and that the inhibition of section 4716 applied both to him and to his widow.

There is no good reason, that I can see, why the Bureau should grant a stay of proceedings in the widow's case to await the outcome of a possible appeal in the invalid case. On the contrary, there are very good reasons why it should not do so. If the action in the invalid case should, on appeal, be reversed, the widow's pension would, of course, be restored to her from the date to which it was last paid. She would lose nothing. On the other hand, if the rejection of the invalid claim should be affirmed, the pension paid to the widow would be totally lost to the Government, since there is no law by which pension unlawfully paid under such circumstances can be recovered. As there is no time limit within which an appeal must be filed, an attorney might, if the contention of the appellant were granted, secure, in a case of this kind, an indefinite stay, during which his client would continue to draw pension contrary to law. I conceive that the only real issue in this case is whether the soldier's service in the rebel army was such as to render him and his widow ineligible to pension under the provisions of section 4716, Revised Statutes.

It may be said, at the outset, that the original grant of pension to the widow was in accordance with decisions of the Department then in force, but that said decisions were subsequently overruled in the case of Job White (7 P. D., 312), which has been followed ever since. The substance of the ruling in the White case is that section 4716, Revised Statutes, applies as well to pensions under the act of June 27, 1890, as to pensions under the old law. The argument submitted by the attorney on April 15, 1897, is as follows:

It appears that the soldier entered the Confederate service while a prisoner of war. Any person undergoing the suffering incident to any of the Confederate prisons would be excusable in resorting to any means to escape therefrom. Such enlistment was under the most striking form of "duress." It was done to escape not only the most severe physical and mental suffering, but actually to save life. It appears that he was soon recaptured by Union forces, reenlisted in the Union Army March 17, 1865, and served therein until discharged July 3, 1866. All the circumstances indicate, in the strongest way, that his connection with the Confederate service was merely a temporary expedient by which to return to the Union side.

This argument rests wholly upon surmise. There is nothing in the evidence to indicate that the soldier's enlistment in the Confederate army was not his free and voluntary act. As was said by Secretary Teller in the case of Joseph S. Hurst (13 P. D., o. s., 292):

The presumption of law is that every man is a free agent and that what he does is done of his own free volition. The law also judges a man's motives and inten-

tions from his overt acts and not from his subsequent explanation of those acts. This being so, it must be presumed that those prisoners who enlisted in the rebel army did so "voluntarily" and that they thereby "aided and abetted the rebellion." That there may have been cases in which such enlistments were made under circumstances amounting to practical duress, with no intention of aiding or abetting the rebellion, but with the design of escaping to the Union lines at the first opportunity, the Department does not doubt; but where such facts are pleaded against the record they must be affirmatively shown.

We know nothing as to the circumstances of this soldier's enlistment except that he was at the time a prisoner at Andersonville. We do not even know how long he had been a prisoner. It may be readily admitted that he was subject to great hardships and privations, but these afford no justification for a desertion of his comrades, who were subject to the same ills, and an enlistment under the standard of the enemy. As was well said by a former Commissioner of Pensions:

If it were allowable for a captured soldier to join the enemy for the purpose of escaping the privations and hardships of prison life, the principle would be established that a prisoner of war would become simply a recruit for the enemy.

I find nothing in the soldier's record to indicate that his enlistment was, as the attorney avers, "merely a temporary expedient by which to return to the Union side." It does not appear that he made any attempt to escape from rebel service and make his way back to the Union lines. He remained with his company and, presumably, did duty as a soldier of the Confederacy, until captured by the Union forces. If he was serving in the rebel army against his will and only as a "temporary expedient" by which to return to the Union side, how is it that when captured by the Union side he did not at once make a declaration to that effect and ask to be sent to his regiment or honorably discharged? There is no evidence that he did anything of the kind. He appears to have been treated as a rebel prisoner and to have silently submitted to be so treated. When he reentered the Union service it was by enlistment as a rebel prisoner in a regiment recruited from rebel prisoners.

The record, it seems to me, not only fails to sustain the theory of the appellant, but is inconsistent with it. It will be observed, moreover, that during the seven years he lived after the rejection of his claim for invalid pension the soldier made no attempt to have it reopened on the ground that his service in the rebel army was involuntary. After careful consideration, therefore, I am of the opinion that the soldier must be held to have voluntarily enlisted in the rebel army and to have, in so doing, "aided and abetted the late rebellion against the authority of the United States." The action of your Bureau rejecting his claim for pension and terminating the widow's pension under the provisions of section 4716, Revised Statutes, is therefore affirmed.

DEATH CAUSE—PREDISPOSING CAUSE—CONSTRUCTION.

NANCY A. STIVES (WIDOW).

1. Where the evidence, lay and medical, goes to show that the cause for which pension was granted to the soldier was complicated with a disease which was the immediate cause of his death, the Department will sustain the widow's claim.
2. The pension laws should be construed in the liberal and generous spirit which prompted their enactment, and where doubts can not be resolved by the evidence, presumption should incline toward the claimant.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
January 26, 1899.*

Henry M. Stives, late of Company F, Second New Jersey Volunteer Cavalry, was borne upon the pension roll under the general law from November 30, 1887, at the rate of \$24 per month by reason of disability resulting from disease of the back. The soldier died on August 9, 1897, and on September 4 thereafter his widow, Nancy A. Stives, filed a declaration for widow's pension under the general law (No. 661725). Her claim was rejected on July 21, 1898, on the medical ground that soldier died of la grippe, not due to cause which has been legally accepted.

From this action appeal was taken on January 10, 1899, resting upon the contention that the evidence shows that soldier's death was due to his military service; that the disease of la grippe only hastened his death a short time, and that the soldier was surely and slowly dying from the disease on account of which he was pensioned—the predominating and predisposing cause of death.

Testimony was taken by special examination in this case, under the advice of the medical referee, for the purpose of ascertaining the exact cause of death, accompanied by instructions to the special examiner to call upon the physician who attended soldier in his last illness and who had been his family physician for fifteen years, for a full history of the soldier's illness from the time of his first treatment and for a full clinical history of the soldier's last illness. The special examination was conducted in the month of July, 1898, at which time P. P. Fisher, the physician above referred to, appeared and testified substantially to the following effect: He had been the family physician of the soldier for the period of fifteen years next preceding his death, and from the first had treated him for diarrhea, enlargement of the liver, heart trouble, sciatic rheumatism, and curvature of the spine; that the soldier's entire trouble was due to curvature of the spine; that the soldier was so badly stooped he did not think there was a sound organ in his body; that the curvature was of a lateral nature, and by virtue of it the different organs of the body were displaced; that there was no caries; that the soldier was a barber by trade and was able to follow that business for a few years, but, on account of the curvature of the spine, soon became unable to do any work of any character; that the

soldier was confined to his bed only one week in his last illness; that he died of exhaustion produced by la grippe, the spinal trouble being the predisposing cause and la grippe the exciting cause; that soldier was affected with valvular disease of the heart, which was no doubt the result of the spinal trouble; that la grippe probably hastened the death of the soldier a little, but if he had not had this trouble in all probability he would have died within a few months, as he was dead to all appearances and had been for some time prior to death; that his organs were in such a debilitated condition he took cold, which was a factor, complicated with the spinal trouble, in producing death. The physician stated that he was present two or three times each day during the last illness of the soldier and observed that he coughed and raised a little, but not more than would have resulted from a cold; that there was no hemorrhage or organic trouble with the lungs. There is no doubt, says the physician, that soldier's death was due to his spinal trouble, which so debilitated him as to make him very susceptible to a cold.

The evidence of the physician in relation to the bent and emaciated condition of soldier is corroborated by the testimony of several lay witnesses. The special examiner who conducted the special examination also reports that he knew the soldier by sight, and that he was bent at the waist so badly that "he was nearly at a right angle."

The facts in this case are very similar to those in the case of Mary E. Cox (3 P. D., 313). In that case the soldier was pensioned for left inguinal hernia and varicocele. He had been a great sufferer from the causes for which he was pensioned and from lung disease, a combination of diseases which had broken down his constitution and rendered him unable to perform manual labor or to attend to business. His enfeebled condition was an indubitable indication of an early death, and in this condition he was placed in the infirmary of Alameda County, Cal., at which place he died the next day of cerebro-spinal meningitis. Under these facts it was held in said case that—

Where the evidence, lay and medical, goes to show that the cause for which pension was granted to a soldier was complicated with a disease which was the immediate cause of the soldier's death, the Department will sustain the widow's claim for pension on account of the soldier's death from said complication of causes, holding the same, for pensionable purposes, to be due to the line of duty in the service.

The cause for which the soldier, John F. Cox, was pensioned was not shown to have any pathological connection with cerebro-spinal meningitis, which the record of the infirmary in which he died declared to be the immediate cause of death. The cause of the soldier's death was held to be "hernia, complicated with cerebro-spinal meningitis."

In the case of Napoleon B. Trask (9 P. D., 113), the principle laid down in the Cox case was reaffirmed. The soldier, Trask, was pensioned for rheumatism and resulting disease of heart, and death was due to suppurative disease of lungs, disease of heart being also pres-

ent. In the opinion of the medical referee, the disease of heart for which soldier was pensioned was a factor in the death cause, yet the disease of the lungs was most prominent. A lung lesion is, in his opinion, based upon a well-established theory, seriously complicated by heart disease. Under these material facts, the minor children of the soldier were held to be pensionable under the general law, upon the principle announced in the case of Mary E. Cox. By a comparison of the facts disclosed by the record of the case at bar with those revealed in the cases of Cox and Trask I am unable to find any reason for denying the application of the same principle in this case. The evidence shows that the soldier had been preyed upon by the disease for which he was pensioned until he was, in the language of his physician, "dead to all appearances," and was so "badly stooped" he did not think "there was a sound organ in his body." The state of disability to which he had been reduced by the cause for which he was pensioned seems to have almost reached a condition of permanent helplessness. La grippe, the immediate cause of death, intervened in time to close the scene, and hastened the fatal event so indubitably foreshadowed by his bent and wasted form, the melancholy result of his military service.

In the case of Trask the Department adheres to the long and unvaried ruling in such cases in these words:

The pension laws should be construed in the liberal and generous spirit which prompted their enactment, and where doubts can not be resolved by evidence presumption should incline toward claimant.

After a careful consideration of the facts presented by the evidence in this case I am led to believe that the action of rejection was erroneous, for which reason the same is reversed with directions that the claim be readjudicated in accordance with this opinion.

EVIDENCE—SUFFICIENCY—INCURRENCE.

M. R. WILLIAM GREBE.

Appellant alleged that by reason of his horse falling upon him he sustained a hernia and injury to ankle and privates. The evidence submitted, which has been accepted as sufficient to show incurrence of hernia, shows as satisfactorily the incurrence of the other named results of said fall, and will be accepted to establish the claim on account of same.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
January 26, 1899.*

M. R. William Grebe, late first lieutenant of Company I, and captain of Company F, Fourth Missouri Volunteer Cavalry, is a pensioner under the provisions of the Revised Statutes at the rate of \$17 per month (total for rank of first lieutenant) for left complete inguinal her-

nia. In his original declaration for pension, filed in your Bureau on June 2, 1897, he alleged, in addition to the hernia for which he is now pensioned, a fracture of right ankle and an injury to penis as having been incurred at the same time and place, and as resulting from the same accident in service that had occasioned the accepted hernia, in the spring or summer of 1863, when he held the rank of first lieutenant. He also alleged, as further additional disabling causes of service origin, rheumatism contracted in the spring of 1864, and a saber wound of left clavicle, incurred at the battle of Jonesboro, Ga., in August, 1864, both of these latter disabling causes when he held the rank of captain.

On June 8, 1898, the date upon which hernia was admitted, so much of said claim as was based upon injury of right ankle, injury to penis, and saber wound of left clavicle was rejected upon the ground that the evidence failed to satisfactorily establish the incurrence of said injuries in the service and line of duty. The service origin of rheumatism was admitted upon the same date, but on June 14, 1898, the claim based thereon was also rejected, upon the ground that no pensionable disability due thereto had been shown to exist since the date of filing said declaration for pension.

From the action rejecting claim for additional pension on account of the additional disabling causes above set forth, as aforesaid, this appeal was taken on December 7, 1898.

The military history of this appellant, as found in the official records of the War Department, is meager and unsatisfactory. It is shown thereby that he was enrolled and mustered into the service as first lieutenant of Company I, Fourth Missouri Volunteer Cavalry, on November 22, 1862, and served as such until April 5, 1864, upon which date he was promoted and mustered in as captain of Company F, same regiment. The records also show that he was on detached service at Pilot Knob, Mo., in December, 1862; was "on expedition" April 3, 1863; was "detailed as aid-de-camp to Colonel Waring" from December 3, 1863, to February 29, 1864; was "attached to staff of Maj. Gen. O. O. Howard" August, September, and October, 1864, and was cashiered and dismissed the service by sentence of court-martial on December 12, 1864.

By an act of Congress which became a law in January, 1897, it was provided—

That the Secretary of War be, and he is hereby, authorized and directed to revoke the order by which M. R. William Grebe was dismissed from the military service of the United States as a captain of the Fourth Missouri Volunteer Cavalry, and to honorably discharge said Grebe to date from the 12th day of December, 1864, etc.

Pursuant to the provisions of said act of Congress so much of "General Orders, No. 223, Headquarters Department of Missouri, dated December 12, 1864," as dismissed from the military service of the United States M. R. William Grebe, captain Company F, Fourth Missouri

Volunteer Cavalry, was revoked, and he was honorably discharged the service, to date from the 12th day of December, 1864.

The records contain no evidence of the origin or existence in the service of any of the disabling causes alleged by appellant as basis for pension, or of medical or hospital treatment therefor.

It appears, however, by evidence of a very exceptional character, that the military services of appellant were of a most valuable and distinguished character, and marked by acts of conspicuous gallantry and bravery. It is shown that at the time he entered the service the appellant was a young officer of the German army, was a thoroughly educated and trained military man, and immediately after joining his regiment in 1862 rendered exceedingly valuable services in drilling and instructing the newly recruited men and officers in their military duties. The colonel of his regiment, the late George E. Waring, jr., of New York City, testifies to the usefulness and value of his services as a company and regimental officer while he was with his regiment, and after he was detached from the regiment in 1864, for duty on the staffs of Generals McPherson, Logan, and Howard, the exceptional and distinguished character of his service in this capacity, and the conspicuous gallantry displayed by him on many occasions is certified to by the late Maj. Gens. F. P. Blair and John A. Logan, and by Maj. Gen. O. O. Howard, and also by the late Gen. W. T. Sherman, in communications the genuineness and authenticity of which is testified to by Gen. L. M. Dayton, late adjutant-general on the staff of General Sherman, who states that they were written and signed by the above-named general officers in his presence. Duly certified copies of these communications appear on file in the case. It appears therefrom, and from the testimony of numerous credible and thoroughly reliable witnesses, who are shown to have been present and to have been eyewitnesses of the facts to which they testify, that at the battle of Atlanta, Ga., July 22, 1864, while serving on the staff of General McPherson, and when that officer lost his life, this appellant charged at the head of a mere handful of men, rescued the body of General McPherson and brought it off the field and captured some of the men who had killed him. On the 28th of the same month, at the battle of Ezra Chapel, Ga., General Logan and others state that this appellant performed one of the most heroic actions of the war, by riding out between the firing lines during the fight and rescuing and bringing back within the Union lines, at the imminent peril of his own life, a wounded comrade who was lying about midway between the two lines of battle. He placed the wounded man before him on his horse and rode back with him under a terrific fire from both sides, and the testimony states that even the enemy ceased firing for an instant and cheered the action. Both Generals Logan and Howard speak in high terms of the distinguished and gallant services rendered by the appellant on August 31, 1864, at the battle of Jonesboro, Ga., where he led an infantry charge against the enemy

on foot, and repulsed them just in time to prevent their breaking through a weak spot in the line of battle. It was in this charge that appellant alleges he received the saber wound of left clavicle for which he seeks pension. In the latter part of 1864 the appellant was offered by the governor of the State of Missouri the command of a regiment of cavalry, which was then being raised and organized in that State, and he left the front and went to the city of St. Louis, Mo., to assume command of said regiment when organized, and to assist in its organization. While awaiting in St. Louis the completion of the organization of said regiment and his appointment and commission as its colonel, the appellant, unfortunately, became involved in a personal difficulty with a brother officer of his old regiment, the Fourth Missouri Volunteer Cavalry, which resulted in a duel, the appellant being the challenged party, in which he shot and wounded his antagonist, but was himself unhurt. For this grave breach of military discipline all the parties to said duel, both principals and seconds, the appellant among them, were arrested, court-martialed, and dismissed the service on December 12, 1864.

The foregoing facts relative to the military career of this appellant, which are abundantly shown by the evidence, although they have no direct bearing on the issues presented in this case, have been set forth at length as indicating his character as a brave and gallant soldier and an educated and honorable gentleman, whose statements relative to the facts in his case are entitled to and should receive more than ordinary weight and consideration. The cause for which he was dismissed, and the circumstances which occasioned his having to leave the service without an honorable discharge, in no way or manner reflect upon his character as an honest, reliable, and truthful man, and afford ample and sufficient reason, as stated by himself, for his delay in asking for a pension for disability incurred during his service, until the stigma of his dishonorable dismissal was removed by a recent act of Congress.

The testimony of thoroughly reliable and credible witnesses, both that contained in the affidavits filed by appellant in support of his claim and that obtained by special examination of this case, shows that since he left the service this appellant has maintained the character of an honorable gentleman, an honest, upright, and truthful man, and a good citizen.

The appellant alleges that some time in the spring or summer of 1863, while with his regiment at Columbus, Ky., he was ordered to take command of a detachment composed of details from various companies of the regiment, and make a raid across the Mississippi River, into Missouri, for the purpose of capturing and breaking up a band of guerrillas; that he proceeded to carry out his orders, and while on said expedition, and when in the act of leading his command in a charge upon the enemy, his horse was shot, or fell with and upon him; that the horse struggled to his feet and dragged him some distance by his

right foot, which was fastened in the stirrup, and again fell on him, and lay struggling and kicking until pulled off by some of his comrades, who dismounted and came to his assistance. He claims that this accident resulted in a hernia, the breaking, or dislocation and permanent injury of his right ankle, and a serious injury to his privates, which, he thinks, were struck by the hoofs of the horse as he lay struggling on the ground.

Colonel Waring, the commander of his regiment and of the post at Columbus, Ky., at the time, testifies by affidavit and on special examination to the fact of the appellant being sent in command of such an expedition, and being seriously injured by his horse falling on him while in the performance of that duty, some time in 1863, but he is unable to remember the nature of the injury sustained. Three of the men who were detailed to go on said expedition, and who came to the assistance of appellant and pulled him from under the horse, and who are reported to be reliable and of good repute, testify to the facts substantially as related by appellant. Other members of said expedition testify to the fact that appellant was hurt, as alleged, and was hauled back to camp in a wagon.

It is true, there is some discrepancy in the statements of the appellant, and in the testimony of the witnesses as to the exact date when this accident occurred. The appellant, himself, says he is unable to fix the date exactly; but that it occurred some time in the spring or summer of 1863, and that he was injured while in command of said expedition, and in the manner and under the circumstances related by him can not be seriously doubted from the evidence.

This evidence has been accepted by your Bureau as sufficient to establish the service origin in line of duty of the hernia for which the appellant is now pensioned, and I am unable to perceive the reason why the hernia should have been accepted, and the injury to ankle and privates rejected. All these injuries were alleged as results of the same accident, and the proof as to one seems to me to be equally as strong and conclusive as to the remainder. It is true, that some of the witnesses state that the only injury they remember the appellant to have received at that time was a rupture, but then, again, other witnesses mention the injury to ankle and privates as resulting from said accident, and fail to remember anything about a rupture. The two witnesses who appear to have been in a position to know more about the facts than anyone else, both specifically state that he received all three of the injuries alleged by him at that time, and that his privates were bleeding when they picked him up. The testimony relative to the continuance from and after discharge to the present time of a disability from injury to ankle and privates is just as strong, convincing, and reliable as that which has been accepted as sufficient to show the continuance of rupture. The medical examinations of appellant show the existence at the present time of a pensionable disability from

injured right ankle and injury to penis, and the medical referee of your Bureau held on December 7, 1897—

That the claim for hernia of left side, affection of penis, and injury of right ankle can not be rejected on medical grounds.

The appellant alleges that he incurred the saber wound of left clavicle on August 31, 1864, at the battle of Jonesboro, Ga., while leading an infantry charge against the enemy. That he did voluntarily lead such a charge in the most gallant and heroic manner is certified to by Gens. John A. Logan and O. O. Howard, as has been hereinbefore alluded to. Numerous witnesses of good character testify that he was wounded in said charge in a desperate hand-to-hand encounter with the enemy. L. H. Wagner, who, the evidence shows, was appellant's orderly at the time, and who is one of the witnesses who states that he helped the appellant up when he was injured by the fall of his horse in 1863, testifies that he accompanied the appellant in said charge, was at his side when he was stabbed in the left shoulder or breast by a saber in the hands of a Confederate officer, and that he (Wagner) cut down the man who wounded appellant.

United States Senator Lucien Baker, of Kansas, states relative to this witness, in his own handwriting and over his signature, that he was well and personally known to him "as honorable, creditable, and worthy in all respects."

This witness is also corroborated by several witnesses of good character, who swear that they were eyewitnesses of the circumstances related by him, and that they are true and correct in all respects.

A pensionable disability is found on the first and last medical examinations of appellant as resulting and existing from this saber wound. It was not alluded to by the surgeon on his second examination by the board at Lansing, Kans., March 9, 1898, for the reason, as stated by appellant, that he at that time had temporarily abandoned the prosecution of his claim on account of said saber wound, and had withdrawn it, but has since renewed it. The only adverse circumstance appearing in this case is the absence of record or medical evidence showing the existence of any of the alleged disabling causes in service, or hospital, or medical treatment therefor. The appellant accounts for this, however, by the statement that he was an officer, and served for a good part of the time on the staff of general officers, and was treated by the regimental and staff surgeons in his quarters and did not go to hospital, and no record was made. He also accounts for the absence of testimony of medical treatment for the disabling causes above considered during the years following his leaving the service by the fact that nearly all of the physicians that had been consulted by him in past years were dead at the late date when his claim was filed.

These objections apply with equal force to the hernia, which has been admitted, and for which appellant is now pensioned, and as his explanation of the absence of medical evidence is sustained, to some extent

at least, by the record of his military service and by the other evidence in the case, I believe, in view of the high standing and character of appellant as a soldier and a citizen, that his statements in this respect are worthy of credence.

In view of the foregoing considerations, I am clearly of the opinion that the evidence in this case should have been accepted as sufficient to establish the origin in service and line of duty and the continuance since discharge of a pensionable disability therefrom of injury to right ankle and privates and saber wound of left clavicle, and that the rejection of appellant's claim for additional pension on account thereof upon the ground stated was error, and said claim should have been admitted.

The appellant alleges that he contracted rheumatism at Memphis, Tenn., in the spring of 1864, while he was holding the rank of captain of Company F, Fourth Missouri Volunteer Cavalry. Several witnesses of good character testify by affidavit and upon special examination to the fact that he was sick with rheumatism at said time and place, and shortly afterwards at Louisville, Ky., while en route to join his regiment, and it seems to be clearly proven that he had been free from rheumatism in any form prior to his entering the service and in service before said time. This evidence appears to have been accepted by your Bureau on the adjudication of this case as sufficient to establish the origin and existence in service and line of duty of rheumatism, a legal approval of the claim for rheumatism having been entered on June 8, 1898. This part of the claim was, however, subsequently rejected on June 14, 1898, upon the medical ground that no pensionable disability due to rheumatism had been shown to exist since the date of filing the declaration for pension. This ground of rejection was based upon the fact that the three medical examinations that have been made of appellant failed to disclose the existence, upon the respective dates when they were held, of any objective signs or symptoms of rheumatism. The evidence in the case abundantly shows, however, that what is described by the witnesses and by the appellant himself as rheumatism, from which he suffered in service and since, was in reality sciatica, and a number of reputable witnesses testify that he has suffered ever since his army service with very severe and acute periodical attacks or paroxysms of this disease.

This branch of this case was, subsequent to the action rejecting rheumatism, called to the attention of the medical referee of your Bureau on December 20, 1898, and very carefully considered by that officer. He replied on January 6, 1899, holding that, in view of the evidence that has been furnished and since sciatica might exist, and in a severe form, at intervals and leave no signs that would be discovered on a medical examination, a further special examination on this point would be necessary before an intelligent and satisfactory medical opinion could be expressed as to whether a pensionable disability, due to the rheumatism or sciatica accepted as existing in service, had existed since the date of filing claim for pension. He sets

forth fully the points to which he desires said special investigation to be directed as follows:

Medical examinations, since the date of filing the claim, do not show any ratable disability from rheumatism, but the evidence is to the effect that the soldier has had paroxysms of pain due to sciatics, and that these attacks have been so severe as to render him temporarily helpless. Medical evidence of treatment for such attacks is wanting. There is lay evidence that treatment was given. There is nothing positive as to the number of such attacks and the degree of severity since date of filing claim. In view of the evidence that has been furnished, and since sciatica might exist, and in a severe form, at intervals and leave no signs that would be discovered on a medical examination, it is my opinion that this claim should be sent to the special-examination division, and that all the evidence, medical and lay, bearing upon the paroxysms of pain termed "sciatic rheumatism" in the evidence should be obtained. The number of attacks in a year, the number of attacks since filing the claim for rheumatism, the nature of the attacks, the apparent cause of such attacks, the parts affected, the duration of the attacks, and medical evidence of treatment, and the character of the treatment are points of importance.

When this examination has been made and is submitted, a positive medical opinion can probably be given in regard to the question asked by you on December 20, 1898. Even if it shall be determined to medically allow this new disability, there is no evidence in the case at present that would warrant any higher rate for the combined disabilities than total of rank the rate now received.

I fully agree with the medical referee that further investigation of this branch of this case should be made on the lines pointed out by him before finally passing upon and adjudicating appellant's title to pension on account of rheumatism. For the reasons above given, therefore, the action of your Bureau, rejecting the claim of appellant for additional pension on account of injury to right ankle and privates, saber wound of left clavicle and rheumatism, is hereby set aside and reversed, and you are requested to cause said claim to be reopened and readjudicated upon its merits, in accordance with the views and instructions herein contained.

CONSTRUCTION—SPECIAL ACT—ARREARS—RATING.

ALONZO B. CHATFIELD.

A special act approved June 8, 1898, entitled "An act to construe an act approved June 3, 1884," relating and including the disability of claimant "with that of a class of pensioners who have lost an arm at or above the elbow;" and providing that said act of June 3, 1884, "be construed to be continuous in its provisions," and that "the Commissioner of Pensions is hereby instructed to reenter and continue the name of said pensioner on the roll with the class of pensioners mentioned in said act, at the rate of pension provided for said class, from and after the passage of this act," is not retroactive in its effect and does not authorize an increase of pension prior to the approval of said act, nor does it authorize a relating or the granting of arrears of pension.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
January 30, 1899.*

Alonzo B. Chatfield, late private of Company B, Thirty-third Illinois Infantry, appealed July 28, 1898, from the Bureau action of July 1,

1898, allowing his claim (Certificate No. 27,832) under special act approved June 8, 1898, rating him \$36 per month for loss of right arm at elbow, from the date of the approval of said special act June 8, 1898.

Claimant contends, in brief, that he should have been rated under said special act of June 8, 1898, at \$36 per month from August 4, 1886, the date at which the rate of the class of pensioners with which he is included was increased from \$30 to \$36 per month, and to \$24 from date of June 18, 1874, under the first special act of June 3, 1884.

Soldier enlisted August 20, 1861, and was discharged September 26, 1863. He was pensioned at \$8 per month for loss of right forearm; increased to \$15 from June 6, 1866; \$18 from June 4, 1872; and \$24 from March 3, 1883. By special act of June 3, 1884, he was pensioned at the rate of \$30 per month for loss of forearm, from the date of said special act.

This act of June 3, 1884, provided that the pension of claimant—

Be rerated and included as equal disability with that class of pensioners who have lost an arm at or above the elbow, under an act of Congress entitled "an act to amend the pension laws by increasing the pension of said soldiers and sailors who have lost an arm or leg in the service, and for other purposes," approved March 3, 1883, such increase to date from the passage of this act.

As heretofore stated, claimant contends that under the above special act of June 3, 1884, he should have been rated at \$24 per month under the general act of June 18, 1874.

This question was heretofore raised on a former appeal, and was decided adversely to claimant by Acting Secretary Muldrow, August 20, 1887, which decision was on motion for reconsideration, reaffirmed by Assistant Secretary Bussey, March 21, 1890.

On June 8, 1898, Congress passed private act No. 272, entitled—

An act to construe an act approved June third, eighteen hundred and eighty-four, rerating and including the disability of Alonzo B. Chatfield, late of Company B, Thirty-third Regiment of Illinois Volunteer Infantry.

That the act approved June third, eighteen hundred and eighty-four, "rerating and including the disability of Alonzo B. Chatfield, late of Company B, Thirty-third Regiment of Illinois Volunteer Infantry, with that class of pensioners who have lost an arm at or above the elbow," be construed to be continuous in its provisions; and the Commissioner of Pensions is hereby instructed to reenter and continue the name of said pensioner on the roll with the class mentioned in said act, and at the rate of pension provided for said class, from and after the passage of this act.

It is to be noted that this act confined, in terms, the benefit conferred to "from and after the passage of this act." It therefore was not retroactive in its effect, and could confer no benefit prior to its enactment. Retrospective laws are strictly construed. (See Sutherland on Statutory Construction, par. 463, 406, and 482.) When the terms of the act are doubtful, they operate prospectively only.

In order to ascertain the purpose or intention, if not clearly expressed in a statute, the history of the act may be ascertained from the legisla-

tive journals. (See *Sutherland on Statutory Construction*, 300; *Blake v. National Banks*, 23 Wall., 307, and *Gardner v. Collector*, 5 Wall., 511.)

A reference to the Congressional Record of March 29, 1898, page 3663, clearly discloses the fact that the act was not intended to be retroactive or to grant arrears. The following transcript is made, Senator Gallinger having charge of the bill:

The bill (S. 4003) to construe an act approved June 3, 1884, rerating and including the disability of Alonzo B. Chatfield, late of Company B, Thirty-third Regiment of Illinois Volunteer Infantry, was considered as in Committee of the Whole. It provides that the act approved June 3, 1884, "rerating and including the disability of Alonzo B. Chatfield, late of Company B, Thirty-third Regiment of Illinois Volunteer Infantry, with that class of pensioners who have lost an arm at or above the elbow," be construed to be continuous in its provision; and the Commissioner of Pensions is instructed to reenter and continue the name of that pensioner on the roll with the class mentioned in the act, and at the rate of pension provided for that class.

Mr. COCKRELL. I should like to ask the Senator from New Hampshire, the chairman of the committee, whether this is not a bill which grants arrears of pension, practically?

Mr. GALLINGER. I will say it was not so intended, and if there is any question about it I wish the Senator from Missouri would offer an amendment making it plain that it does not.

Mr. COCKRELL. I think it does, beyond any question.

Mr. GALLINGER. It ought not to grant arrears, and if the Senator will prepare an amendment, I shall be glad to have it adopted.

Mr. COCKRELL. I move to insert at the end of the bill the words "from and after the passage of this act."

The amendment was agreed to.

The bill was reported to the Senate as amended, and the amendment was concurred in.

The bill was ordered to be engrossed for a third reading, read the third time, and passed.

I am clearly of the opinion that said special act of June 8, 1898, is not retroactive in its terms, and does not authorize an increase of pension prior to the approval of the act; nor does it authorize a rerating, or the granting of arrears of pension.

No reason appears for reversing the action appealed from, nor the former departmental decision in this case, and said Bureau action is accordingly affirmed.

The papers, including a copy of the departmental decision of August 20, 1887 (the original having disappeared from the files in the case), are herewith returned.

NEGLIGENCE—DEATH CAUSE.

SARAH H. MONTY (WIDOW).

Soldier, an epileptic and a carpenter, went upon the roof of a building without any other motive than a desire to pursue his usual avocation, was seized by an epileptic fit, fell to the ground, and was killed by the fall. He was well aware of his epileptic condition, having been subject to seizures once or twice a week for some time previous.

Held: If the death of a soldier is shown to be due to his own negligence, the fact that a pensioned cause was present as a factor in said death is subservient to the greater and proximate factor of the negligence of soldier. Negligence, and not epilepsy, was the proximate cause of death. (*Balto.*, etc., *R. Co. v. James*, 95 U. S., 439; *La. Mut. Ins. Co. v. Tweed*, 7 Wall., 52; *Mil. Rway. Co. v. Kellogg*, 94 U. S., 474; *Margaret Moran*, 9 P. D., 492.)

Assistant Secretary Webster Davis to the Commissioner of Pensions,
January 26, 1899.

The appellant herein, Sarah H., widow of Seymour Monty, formerly a private in Company H, One hundred and eighteenth New York Volunteer Infantry, filed her application under the general law on June 19, 1886, alleging death of soldier by reason of epilepsy incurred in the service. Claim was rejected on August 29, 1888, on the ground that the cause of death was not due to the service, and an appeal, filed on December 2, 1897, contends that the rejection is contrary to law.

The facts upon which rejection was had were as follows:

Soldier was an epileptic, the evidence showing that he had epileptic fits as often as once or twice a week. He was a carpenter by trade and followed that calling after discharge. His attention was frequently called by his family and friends to the fact that, being subject at any time to epileptic seizures, his trade was a dangerous one and should be abandoned. He made light of the admonitions, intimating that he could take care of himself. On June 26, 1895, while in pursuit of his occupation as a carpenter, being on the roof of a building at No. 18 Warren street, Chicago, Ill., he was suddenly, and apparently without warning, seized with an epileptic fit, fell to the ground, and was killed by the fall. The above is shown by testimony of witnesses and a copy of the verdict of the coroner's jury.

The contention in the appeal is to the effect that epilepsy was the cause of death, and the issue is wholly one of law.

One of the first as well as paramount duties that one owes to civilized society is the preservation of his own life. This proposition has never been doubted, and is too axiomatic to call for extended discussion. It rests at the foundation of our social structure, and the law in all of its various phases bears out its truthfulness. And further, one has no more right to put his life in danger, without a sufficient cause, than he has to take it himself. It naturally follows, then, that it is one's duty to use ordinary care and diligence in the preservation of his life, and that he should not be guilty of negligence when such negligence might naturally result in its destruction.

Negligence has been variously described, but perhaps the best definitions, as they apply to the case at bar, are those given by Alderson, B., and Mr. Justice Swayne, viz:

The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. (*Blythe v. Barrington*.)

ton Waterworks Co., 25 L. J. Ex., 213.) Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done. (Baltimore, etc., R. Co. v. James, 95 U. S., 439.)

Applying these principles to the facts in the case at bar, we find that soldier, fully cognizant of the danger and without being impelled so to do by any necessity or by any sudden impulse, or actuated thereto by any other motive than a desire to follow his usual vocation, voluntarily put himself in a position where, by reason of his tendency toward epileptic seizures, fatal consequences might naturally ensue. Had he exercised that care which a prudent man subject to epilepsy would have used, he would not have done that which laid him liable to a fatal accident.

As to the cause that produces a certain effect, the law looks as to negligence to the proximate, and not to the remote or casual cause. It is often extremely difficult to draw a distinct line between a proximate and casual cause, but the general rule followed is that a proximate cause is one which but for the negligence of the person the event would not have happened. (Louisiana Mut. Ins. Co. v. Tweed, 7 Wall., 52.) The proximate cause need not be, in point of time, the one which immediately preceded the effect. Mr. Justice Strong lays down the rule as to this point as follows:

The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments. * * * The question always is, Was there an unbroken connection between the wrongful act and the injury—a continuous operation? (Milwaukee Rwy. Co. v. Kellogg, 94 U. S., 474. See also Margaret Moran, 8 P. D., 492.)

The question at issue in the case at bar is, Was the epilepsy the proximate cause of death? From one point of view the question must certainly be answered in the affirmative; for, had it not been for the epilepsy acting through the fall from the roof, death would not have ensued in the manner that it did. But this is not enough. Was there any other cause which, acting prior to the attack of epilepsy, was the governing factor in the incident? This query must also be answered in the affirmative; for we have already seen that the soldier, with a complete knowledge of all necessary facts, laid aside all that caution which it was his bounden duty to exercise, and voluntarily placed himself in a condition with such surroundings that a fatal accident might naturally result to him. The roof of a house is not, to a carpenter in normal condition, a dangerous situation; but a more dangerous situation to a carpenter liable at any moment to an epileptic seizure could scarcely be imagined. The negligence, and more than negligence, the recklessness of the soldier in imperiling his life as he did, by placing himself in a position where a natural result would be death to him, is responsible for the fatal effect.

The incident may be summed up as follows: Death by reason of a fall from the roof; an epileptic fit which caused the fall; and, back of

that, negligence in going upon the roof with a full knowledge that an epileptic seizure might take place at any time. Death was a natural result of the negligence, and came about by an unbroken sequence between that negligence and the fatal fall.

It is evident by the face brief that you have considered soldier to have been guilty of contributory negligence; but I fail to find any of the elements of contributory negligence in the case. Contributory negligence can not be imputed unless there is negligence on the part of one person, which negligence, cooperating with the negligence of another person, produces a given effect.

Contributory negligence, in its legal signification, is such an act or omission on the part of plaintiff, amounting to a want of ordinary care, as concurring or cooperating with the negligent act of the defendant is a proximate cause of the injury. (Beach on Con. Neg., sec. 377; Cooley on Torts, 674; Sherman and Red. on Neg., sec. 25; Wharton on Neg., sec. 300; Deering on Neg., sec. 12.)

I do not intend to convey the impression that under the facts as shown in this case the distinction between negligence and contributory negligence is material. I can easily conceive cases, however, which might arise in pension claims where the distinction would have to be drawn. It would be unwise to lay down any rule as between the two, but it is proper to state that if the death of a soldier is shown to be due to his own negligence the fact that a pensioned cause was present as a factor will be held subservient to the greater and proximate factor of the negligence of the soldier.

I find that the soldier in question was guilty of negligence, pure and simple, and that the epilepsy was only a casual and not the proximate cause of death.

Claimant is a pensioner under the act of June 27, 1890.

The action appealed from is affirmed.

DEPENDENT RELATIVES—COLORED PERSONS—EMANCIPATION—SECTIONS 4704, 4705, 4707, AND 4723, REVISED STATUTES.

DANIEL BIRD (FATHER).

Soldier was born in 1843, the fruit of a slave marriage consummated in accordance with slave customs in Mississippi in 1833, and died January 14, 1896. His mother died in Mississippi in 1863, six years before said marriage could have been ratified under the constitution of that State. His father filed a claim June 2, 1897, for a pension under the act of June 27, 1890, as dependent father. *Held:*

1. That the marital relation between soldier's father and mother was null and void, in law, and claimant has no legal status as the father of soldier.
2. Neither section 4704 nor 4723, Revised Statutes, affect, in any manner, the dependent fathers' claims.
3. The emancipation proclamation did not become operative except when enforced by the armed forces of the United States, nor did it change the legal status of persons held in slavery.

Assistant Secretary Webster Davis to Commissioner of Pensions, January 30, 1899.

The appellant herein, Daniel Bird, alleged dependent father of Daniel Matthews, formerly a private in Company F, Fifty-eighth United States Colored Volunteer Infantry, filed his declaration under the act of June 27, 1897, on June 2, 1897. Claim was rejected on August 2, 1898, on the ground of no title, and an appeal filed on October 29, 1898, contends that rejection is contrary to law.

The issue raised by this appeal is as to the status, under the pension laws, of the father by nature of a son born in slavery, the facts in the particular case being as follows: Daniel Bird, a slave, was married according to slave custom on December 23, 1833, to Maria, also a slave, in Adams County, Miss. The soldier in question was born as the fruit of this union, in said county and State, in the year 1843. The mother, Maria, died in the month of September, 1863, at Bayou Mason, in Mississippi. Said Daniel Bird always recognized the soldier as his son, and they appear to have lived together, after discharge in 1866, mutually recognizing the tie of father and son, until the soldier was placed in the Mississippi State Lunatic Asylum on October 4, 1894, in which institution he died on January 14, 1896. The question of dependence has not been passed upon by the Commissioner of Pensions, the claim having been rejected for reasons previously stated.

It becomes necessary at the outset to investigate the status of slaves as affected by a slave negro and negress assuming the marital relation. The principle of law involved is laid down clearly and succinctly in Hall v. United States (92 U. S., 27), in which the court said:

It was an inflexible rule of law of African slavery, wheresoever it existed, that the slave was incapable of entering into any contract, not excepting the contract of marriage.

Certainly, then, the marital relation existing in 1833, the date of the slave marriage in question, and in 1843, the date of the birth of the soldier, was, in the eyes of the law, absolutely null and void. This being true, no rights of any kind or nature could spring from the fruit of such marital relation while their status was that of slaves. Such a marriage, although null and void at the dates stated, might be afterwards confirmed, which confirmation might result in dating the marriage back to inception, so far as certain rights are concerned. (Stewart on Mar. and Div., secs. 74, 150, and 151.) It must be distinctly understood that such a doctrine does not hold the marriage to have had any validity at the time it was consummated; but that on account of certain legal principles springing into existence by reason of facts transpiring later on some effect is given to the result of a previous act which was at the time null and void. (Stewart on Mar. and Div., sec. 23, and cases cited thereunder.)

The constitution of the State of Mississippi, ratified on December 1, 1869, in section 22, of article 12, recites:

All persons who have not been married, but are living together and cohabiting as man and wife, shall be taken and held for all purposes of law as married; and their children, whether born before or after the ratification of the constitution, shall be legitimate.

Note that the constitution speaks of the individuals in the present tense, as "living together and cohabiting." Now, Maria having died a number of years previous to the adoption of this constitution, it became a physical impossibility for appellant and Maria to be "living together and cohabiting" on December 1, 1869. The conclusion is therefore irresistible that the constitution did not in any way affect or ratify any marital act of appellant and Maria, for a fulfilling of the condition precedent, viz, the "living and cohabiting together" on December 1, 1869, was an impossibility. This point was definitely settled by the supreme court of Mississippi, in discussing the effect of the constitutional clause recited, in *Floyd v. Calvert* (53 Miss., 37), in these words:

Those only shall be taken and held as married who were, at the instant of the ratification of the constitution, living and cohabiting together as man and wife, willingly and actually recognizing each other as husband and wife, and desiring that that relationship should exist between them. (See also *Dickerson & Brown*, 49 Miss., 373.)

The marital status, then, of appellant and his slave wife and the fruit of the said marital relation must stand on the same footing as that of a slave marriage and its results, no ratification ever having been made or even possible.

The appeal contends that the emancipation proclamation, promulgated on January 1, 1863, nine months before the death of Maria, had the effect of overturning the former status of slaves, and of inferentially legalizing the former union of appellant and Maria. This Department held, in the case of *Harriet Tinnin* (8 P. D., 218), that—

The proclamation of President Lincoln of January 1, 1863, known as the emancipation proclamation, was effective only as a war measure, and did not ipso facto, and by the mere force of its own terms, set free or change the legal status of persons held in slavery in the States, or parts of the States, therein designated, but operated to give freedom to such persons only when it was enforced by the armed forces of the United States.

This statement is fortified by acknowledged authorities on international and constitutional law, as well as by decisions of the Supreme Court and various courts of last resort in different States.

It is contended, however, by the appellant that various laws of Congress regarding pension claims do away with the principles of law heretofore recited, and that the pension laws intend to, and do, fix upon appellant a pensionable status, the laws referred to evidently being sections 4702, 4704, 4705, and 4723, Revised Statutes.

A careful reading of section 4705 demonstrates that it applies strictly and solely to widows and children of soldiers, and goes wholly to the status of a widow of a colored or Indian soldier, and to the children of such soldiers. I see no reason whatever to believe that it can be successfully invoked as collaterally furnishing a basis for proving that one is entitled to a pensionable status as an alleged dependent father. Different beneficiaries under the pension laws stand upon a variety of footings, and because a certain law entitles the widow of a soldier or the children of a soldier to a pension, it can not be said that, ergo, the said law bestows directly or indirectly a title upon a father. A father's claim must stand upon its own foundation, resting upon the laws which unquestionably affect a father's claim. As stated, I find nothing in section 4705, Revised Statutes, which in any way, collaterally or otherwise, applies to a dependent father's claim.

Equally true does the above argument apply to section 4702, Revised Statutes, which has to do solely with the claims of widows and children of soldiers; there being nothing in said section which, in any measure, has to do with or attempts to define the status of a father. Under this section the child has a pensionable status because it is the heir of the soldier; the widow taking first, and the child succeeding, under certain circumstances, to the widow's title; or, under certain other circumstances, taking title direct, which title would have been in the widow had there been one.

Mutual recognition of the relationship existing between appellant and the soldier is insisted upon as proof that the legal relation of father and son existed.

Section 4704, Revised Statutes, is as follows:

In the administration of pension laws children born before the marriage of their parents, if acknowledged by the father before or after marriage, shall be deemed legitimate.

The wording of this section is identical with that of the original law, which is section 10, of Chapter CCXXXIV, acts of the third session of the Forty-second Congress. In said chapter, which is "An act to revise, consolidate, and amend laws relating to pensions," the rights of widows and children are taken up at section 8, and continued through sections 9, 10, 11, and 12, no other subject, or persons, or class of persons being treated of in any manner. The conclusion, then, is forced upon us that section 4704, Revised Statutes, refers to the status of a child *per se*, or so far as it might affect the right of a widow claiming for the child. In line, the very terms of section 4704, Revised Statutes, show such fact unmistakably. It certainly can not be said, without doing violence to all rules of reasoning, that because a statute declares a child of a soldier legitimate for pensionable purposes, that therefore the father of the soldier is the soldier's lawful father for pensionable purposes.

It is an indisputable maxim of the common law that a child born out of wedlock follows the civil condition of its mother. Consequently,

without statutory enactment, a child of a soldier born out of lawful wedlock would have no pensionable status. The section under discussion does away with this common-law rule, and is nothing more nor less than a remedial statute, bestowing a pensionable status upon a child, without which remedial statute it would have none. It deals, however, wholly in relation to the status of a child of the soldier, and can not be considered in any possible light as affecting the status of the father of the soldier.

It is a misnomer to call, in such a case as the one under discussion, a father or child illegitimate. A slave, and his offspring born a slave, had no civil status other than property. The child was nullius filius; he had no legal father, and could take no rights under the law by being the son of the man who had begotten him. Equally is it true that the father could take no right under the law from the child, for the reason that he had under the law no legal status as a father. Section 4704 remedies this as far as a child of a soldier is concerned, but not as to the father of the soldier.

It should not be forgotten that this section is not a law governing simply colored children. It is not aimed at legitimatizing colored children only so far as they may come under its general provisions, and no argument as to the pensionable rights of a slave father can be founded on said section. The effects of a slave marriage, so far as they relate to the marital status of a colored soldier and his wife and children, are treated with in section 4705, which section we have seen has nothing whatever to do with the status of a dependent father.

It remains only to consider any bearing that section 4723, Revised Statutes, may have upon the question under discussion, it having been specifically invoked.

Said section is to the effect that all colored persons who were borne on the rolls of the organizations to which they belonged as slaves should be entitled to the same rights under the law as to bounty and pension as though they had not been slaves at the date of their enlistment. The effect of the statute is clear, in that it removes a certain civil disability resting upon certain colored soldiers. It has nothing to do with the marital condition of a soldier's father or mother; it is purely a remedial statute for a colored soldier's benefit, and affects only a soldier's status who fell within the provisions of the section, as well as possibly said soldier's children.

No discrimination is made against appellant because of his race, color, or previous condition, nor against the soldier for the same reasons. The appellant's claim is rejected because his status is such that there is no law under which he can be pensioned. A pension is a public grant, and no one is entitled to such grant unless he is conclusively shown to be within the enabling statute.

Whatever is not unequivocally granted is taken to be withheld. (*Holyoke Co. v. Lyman*, 15 Wall., 500.)

No act of any officer of the Government can create or confer a right to a pension, unless such officer be authorized by law so to do. (Catherine Harris, widow, 2 P. D., c. s. 256. Secretary Delano.)

The action appealed from is affirmed.

INSANE PERSONS—DECLARATIONS—PENDING CLAIM.

BENJAMIN R. MAYS (INSANE).

Application on behalf of an insane sailor without guardian made by his wife accepted as sufficient to constitute a "claim pending" at the date of his death.

Assistant Secretary Webster Davis to the Commissioner of Pensions, January 30, 1899.

The appellant, Deborah E. Mays, on October 10, 1892, filed a declaration on behalf of her husband, Benjamin R. Mays, formerly a sailor in the United States Navy, in which she stated that he was enrolled on the 20th of May, 1861, and honorably discharged on the 20th of May, 1862; that he had not been employed in the military or naval service otherwise; that he was now unable to earn a support by manual labor by reason of his being insane; that this disability was not a result of vicious habits and was, to the best of her knowledge and belief, permanent; that he had never received a pension, and that she made this declaration for the purpose of having him placed on the pension roll under the provisions of the act of June 27, 1890, and asked that the pension, when allowed, be paid to her as his lawful wife, as provided by the act of Congress approved August 8, 1882. This declaration she signed "Deborah Mays, lawful wife." The sailor died on the 25th of June, 1893. The appellant filed, on July 20, 1893, a claim for pension in her own right as widow, under section 3 of the act of June 27, 1890, which was allowed in March, 1894. The claim filed by her on behalf of the sailor was, at the same time, rejected on the ground that as she was not the sailor's legal guardian she could not make a valid claim on his behalf, and on the further ground that "the sailor having died, no person would have title to complete the claim if it were valid." From that action an appeal was taken December 13, 1897.

The second ground of rejection above stated was in accordance with rulings in force at the time the action was taken, but is no longer tenable, it being now held that the provisions of section 4718, Revised Statutes, are applicable to the act of June 27, 1890, and authorize the widow or minor children of a deceased soldier to prosecute his pending claim under said act and receive the accrued pension to the date of the death of such soldier. (See Adolph Bernstein, 7 P. D. 229, and Rachel M. Hix, *ib.*, 259.) The only question to be considered, therefore, is whether the sailor had an application for pension under the act of June 27, 1890, pending at the time of his death. The appellant asserts that

he was insane, confined in an asylum, and without a guardian, and contends that she had a right to make application for him as "next friend."

In the case of Joseph Crawford (7 P. D., 582) the Department held that a person non compos mentis and without a committee or guardian may file a valid declaration for pension by his next friend, applying the ruling in the case of Simon P. Showalters (7 P. D., 478) as to the filing of a declaration by the next friend of a minor.

In the case of Joel Ames (8 P. D., 171) it was held that where a person has not been judicially declared insane, or confined in an asylum or public institution for the care, keeping, and treatment of the insane, he may prosecute a claim for pension in person; and that where a person has been judicially declared insane, or is confined in an institution for the safe-keeping, care, and treatment of the insane, he must prosecute his or her claim by next friend, guardian, or committee, but payment will be made only to the qualified guardian or committee.

Assuming it to be true that the soldier was insane and confined in an asylum on October 10, 1892, and that he was without a guardian, I am of the opinion that an application in his behalf for pension under the act of June 27, 1890, could be made and prosecuted by his wife as "next friend," and that the declaration filed by her on said date should be accepted as a valid application in that capacity.

The sailor being dead, and the right to the pension applied for having, upon his death, vested in the widow, the appointment of a guardian is, of course, unnecessary. In fact, it might be dispensed with, even if he were alive, by the exercise of the discretionary power vested in the Commissioner of Pensions by the act of August 8, 1882.

The action of your Bureau is reversed, and readjudication directed in accordance with the views above expressed.

MARRIAGE—DISTRICT OF COLUMBIA.

HENRY HIGGINS (DECEASED).

ANNIE HIGGINS (WIDOW).

1. The rates of pension allowed in the deceased soldier's claim were in accordance with the certificates of medical examination therein.
2. A marriage per verba de presenti was valid at common law, and is valid within the District of Columbia. (Thomas v. Holtzman, 18 D. C., 62; Meister v. Moore, 96 U. S., 76.)

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
January 31, 1899.*

Henry Higgins was a member, during the war of the rebellion, of Company D, Ninety-seventh Pennsylvania Infantry, and was a pensioner, certificate No. 169787, under the general law, at the time of his death, October 17, 1892.

On March 17, 1886, he filed a claim for additional pension on account of rheumatism, which was rejected March 16, 1889, on the ground of his failure within a reasonable time and after due notice to establish the same by the necessary evidence. Thereafter the claim was reopened and was yet pending when he died. His widow, Annie Higgins, this appellant, completed the same, and it was allowed in June, 1896, at \$4 per month from August 9, 1883; \$8 per month from January 13, 1888, and \$14 per month from January 20, 1891; the rate on account of the original pensioned cause, "loss of part of right index finger," being \$3 per month in addition.

On March 8, 1893, appellant filed a claim for pension as his widow, under the general law, which was allowed in June, 1896, at \$8 per month, with \$2 per month additional on account of each of four minor children of the deceased soldier, a ceremonial marriage on January 20, 1887, having been shown.

On July 16, 1896, she filed a claim for rerating of her said pension, alleging a common-law marriage prior to March 19, 1886, date of approval of the act of Congress providing that the rate of pension of widows should be \$12 per month, unless they were married to the soldier subsequent to that date, in which case it should remain as fixed by former laws, viz, at \$8 per month. And on May 25, 1897, she also filed a claim for rerating of her deceased husband's pension.

No formal record of final action appears to have been made in either of these rerating claims, however, although the jacket contains an indorsement dated September 11, 1896, that the attorney was then advised that "common-law marriages are not recognized in the District of Columbia, the residence of claimant and soldier," and also an indorsement dated September 16, 1897, that the request for rerating of the soldier's pension can not be considered, there being no manifest injustice in the rating of such pension, and on October 6, 1897, said Annie Higgins, through her attorneys, appealed in both these claims, contending a common-law marriage prior to March 19, 1886, is shown in her own claim, and manifest injustice in rating in the deceased soldier's.

The papers were returned by me on July 15, 1898, for a report as to your final action, and on their retransmittal I find a brief-face in each of the appealed claims, showing that the claim by the widow in her own case was rejected July 22, 1898, on the ground that no valid marriage prior to March 19, 1886, is shown, as held by the law division of your Bureau, and that her claim for rerating of her deceased husband's pension was rejected August 22, 1898, because of no medical grounds for rerating.

The soldier's original claim was filed September 17, 1867, on account of loss of his finger, and such pension was allowed in 1880 at \$3 per month, the middle and distal phalanges of the right index finger being amputated, leaving only the proximal phalanx. The rating allowed on account of this disability is in accordance with the recommendation

made by every examining board in the case, and no injustice, therefore, can be said to exist in such rating.

The certificates of examination in August, 1885, states the only external structural changes from rheumatism were enlargement of joints of fingers of left hand and exostosis on each patella. The action of the heart was also somewhat increased and irregular and area of cardiac dullness increased, with blowing systolic murmur over region of mitral valves. The surgeons stated there was valvular lesion with some hypertrophy, probably due to rheumatism.

The next examination, in January, 1888, showed that the only "surface manifestations" of rheumatism were—

The right elbow and knee joints one-half inch more in circumference than the left, somewhat sensitive upon manipulation, and elbow quite stiff.

The heart's action was also—

variable in frequency, but not irregular; no murmur; no perceptible enlargement; no disturbance of general circulation,

and eight-eightieths was recommended for rheumatism.

When next examined, in January, 1891, but eight-eightieths was again recommended for that disability and disease of heart. The description of the disability, however, given in the certificate of that examination would seem to warrant a higher rating, and fourteen-eightieths was accordingly allowed in the grant of pension.

The description is as follows:

Left ankle joint is red and swollen. He is quite lame in consequence. The joints of fingers are permanently enlarged by deposits, due to former attacks of inflammation. Left shoulder joint is lame, stiff, and dry. Heart's action is rapid and forcible. There is some hypertrophy, with aortic stenosis. No mitral deficiency detected. Position normal. Slight dyspnoea after exercise, and pulse rate increased as above indicated (96-116). Lungs are normal.

It is manifest from these descriptions of the soldier's disability from rheumatism that no injustice was done in rating his pension on account of such disability or of all his disabilities. Your rejection of his widow's claim for rerating of his pension was therefore proper, and is affirmed accordingly.

As to the question of marriage herein, the law of the place where the parties resided at the time of marriage, or at the time the right to pension accrued, determines the validity or invalidity of the marriage, under the act of Congress approved August 7, 1882. (Pension Laws, etc., ed. September, 1897, p. 54.)

It appears that this soldier was a resident of the District of Columbia at the time of his death, and that he and appellant were ceremonially married there in 1887, and had lived there since the beginning of their alleged prior matrimonial cohabitation.

The law division holds that common-law marriages are not valid in said District.

Assistant Secretary Hawkins held in 1888 in the case of Fanny

Curtis, colored (2 P. D., 159), that as there is no law of the District expressly declaring invalid herein a marriage which would be valid at common law, such a marriage must be held to be valid in this District, under the decisions of the United States Supreme Court in *Meister v. Moore* (96 U. S., 76), and *Maryland v. Baldwin* (112 U. S., 490), that—

A marriage valid at common law is valid, notwithstanding the statutes of the State where it is contracted prescribe directions respecting its formation and solemnization, unless they contain express words of nullity.

That decision (by Assistant Secretary Hawkins), however, does not discuss the question at any length, and the question does not appear to have been given very full consideration in its legal aspects, no mention even being made of the act of Congress approved February 27, 1801, which declared that the laws of the State of Maryland should be and continue in force in that part of the District of Columbia ceded to the United States, which is the present District as a whole; that part of the District which had been ceded by the State of Virginia having been retroceded in 1846.

It is held by the courts of Maryland and is the settled law in that State, under the Maryland statute of 1777, that some religious ceremony is necessary to perfect a marriage, and that no lawful marriage can be contracted merely *per verba de presenti* or *per verba de futuro cum copula* (*Denison v. Denison*, 35 Md., 361). A grave question, therefore, arises whether that holding by the courts of Maryland should govern as to the law of this District; and the question requires most careful consideration.

The act of 1777, the only law of Maryland upon the subject, provides (section III) that—

The rites of marriage between any white persons, subjects or inhabitants of this State, shall not be celebrated by any person within this State, unless by ministers, etc.; * * * and if any person shall celebrate the rites of marriage between any white persons, as aforesaid, contrary to the true intent and meaning hereof, he shall forfeit and pay for every offense five hundred pounds current money.

And also (section V) that—

No person within this State shall marry without such license as by this act is directed, etc., * * * under penalty of five hundred pounds current money, etc.; * * * and if any minister shall marry any person without such license or publication as aforesaid he shall forfeit five hundred pounds, etc. * * *

And the only additional provision made by Congress since 1801, as to marriages in the District of Columbia, is as to the persons who may officially celebrate marriages, the act of May 13, 1896, providing that judges of courts of record and justices of the peace, as well as ministers of the church, may so officiate.

As stated above, the courts of Maryland hold that under this law of 1777 some religious ceremony is essential, and that a contract of marriage *per verba de presenti* or *per verba de futuro cum copula* is not sufficient to constitute marriage.

In the early case of *Cheseldine v. Brewer* (1 Har. & McH., 152), however, decided in 1739 (prior, it should be noted, to the enactment of 1777 as to religious celebration of Maryland marriages), the court of Maryland affirmed a judgment rendered on an instruction, given upon an issue involving a question of legitimacy, that—

If the jury find that the said Kenelm and Mary had consented and agreed to be man and wife, and had cohabited and copulated as such before the birth of the lessor of the plaintiff, they should render their verdict for the plaintiff.

But this decision was not followed in *Fornhill v. Murray* (1 Bland, Ch., 482), decided in 1821; and was expressly repudiated as an authority in *Denison v. Denison*, above cited.

The court stated in *Fornhill v. Murray* that—

Certainly the most correct if not the only legal mode of contracting marriage, here as in England, is by having it celebrated in the face of some church or with the blessing of a clergyman.

This seems to speak somewhat doubtfully of the necessity of a religious ceremony, but decisions succeeding that of *Denison v. Denison*, cited, decided in 1872, in which such a ceremony is declared to be indispensable, and marriages per verba de presenti and per verba de futuro cum copula are expressly repudiated, adhere to the holding that some such ceremony is needed to validate a marriage in that State; although the fact of a ceremony need not always be strictly proved, evidence of general reputation merely, from which marriage may be inferred, being sufficient except in cases of adultery or bigamy, in which, only, strict proof is required. (*Jackson v. Jackson*, 80 Md., 176, 82 Md., 17; see also *Boone, Lessee, v. Purnell*, 28 Md., 607; *Redgrave v. Redgrave*, 38 Md., 97; and *Jones v. Jones, Admr.*, 45 Md., 159, 48 Md., 391.)

Stewart on Marriage and Divorce cites the District of Columbia as a territory in which a celebration is not necessary to the validity of a marriage in that District, and refers, as supporting his statement, to the cases of *United States v. McCormick* (1 Cranch C. C., 593); *United States v. Lambert* (2 Cranch C. C., 137); *Blackburn v. Crawfords* (3 Wallace, 175); and *Meister v. Moore* (96 U. S., 76); none of which cases, however, except the last, in fact pertains to this question.

The case of *United States v. McCormick*, cited, was on an indictment for celebrating a marriage of a woman under 16 years of age without consent of parents, contrary to the Maryland statute, and was decided upon the points only (1) that the addition "clerk" to the name of the accused on the indictment was not sufficient under the statute as an allegation that he was a clergyman, entitled to celebrate marriages, at the time of the alleged offense, and (2) that the failure of the indictment to allege that the marriage in question was celebrated without the consent of the woman's guardian was fatal to it, although it alleged such marriage was without the consent of parents, the statute providing that the consent of parents or guardians must be obtained.

So in the case of *United States v. Lambert*, an indictment for big-

any, it was held only that the fact that a clergyman was authorized to celebrate marriages may be shown by parol testimony, as any matter in pais.

Likewise in the case of *Blackburn v. Crawford*, it was held only that a marriage in the District of Columbia, celebrated in fact by a clergyman, is not invalid for want of a license.

The parties in that case lived in Maryland, and a certain ceremonial marriage in the District of Columbia was alleged. The trial court was asked to instruct the jury that—

It is competent for them on all the evidence to find that no marriage was ever celebrated between the said Crawford and Elizabeth Taylor, and unless they find that a marriage was in fact celebrated between them their verdict ought to be for the defendant.

This instruction the court refused to give, and gave instead, on its own motion, one to the effect that a marriage in Maryland is lawful although not solemnized before any minister of the gospel.

The Supreme Court held that the instruction asked, but refused, was "unexceptionable," and that given erroneous, under the pleadings, because it instructed as to finding a marriage "at any time," the pleadings alleging one at a particular time; and the court stated expressly that—

In our view of the case, the question of a marriage per verba de presenti did not arise. We have, therefore, not considered that subject.

The case of *Meister v. Moore*, also cited by Mr. Stewart, was a Michigan case, and was decided upon an authoritative decision by the supreme court of that State as to common-law marriages therein, such decision by the State court being held by the United States Supreme Court to be binding upon the latter in the case then before it.

As seen, therefore, none of these decisions cited by Mr. Stewart was upon the question of the law as to marriages in the District of Columbia, and after careful research among the published reports of the decisions of the courts of the District of Columbia I find but one decision bearing upon this question, the case of *Thomas v. Holtzman* (18 D. C., 62), decided in 1888, which was a case involving an issue of marriage between a free colored man and a slave woman in the District.

The court (Justice Merrick delivering the opinion) stated:

It is not at all apparent that it ever was the law that a marriage in facie ecclesiæ was necessary for the purpose of legitimating the issue. It is true that the court of appeals of Maryland in the last four or five years has decided that such was the law, but that decision is not binding upon us. It is laid down by Blackstone that a marriage per verba de presenti, without the intervention of a clergyman, is a legitimate marriage, and both Story and Kent say that according to the universal understanding in this country a marriage per verba de presenti, without the intervention of a clergyman, followed by cohabitation, makes a legitimate marriage. In the year 1844 that question was greatly contested in the case of *The Queen v. Mills*, in the House of Lords in England, and by a divided court the judgment of the Irish tribunal was sustained, which has affirmed that a marriage in facie ecclesiæ was necessary to give legitimacy

to the issue. That was, as we have said, by a divided court, and the opinion of Lord Campbell in the case, one of the ablest opinions that has ever been written, is a most powerful vindication of the ancient doctrine that a marriage, to be a valid marriage, so as to legitimate the issue, does not require the presence of a clergyman. He cites with marked emphasis and approbation the authority of Kent and Story as to the common law on this subject, certainly as it was formerly understood in America.

The court, continuing, states that the above remarks were by way of suggestion merely,

in order to repel the conclusion that it has been definitively settled that the presence of a clergyman is necessary so far as the legitimacy of the issue is concerned;

and decides that case under the statute as to colored persons. This expression of opinion, however, can not be regarded as mere obiter dicta, as Mr. Justice Strong, of the United States Supreme Court, said in the case of *Meister v. Moore*, cited above, concerning a similar expression made by Justice Cooley, of the supreme court of Michigan, in the case of *Hutchins v. Kimmel*, cited by Mr. Justice Strong; but it is "an authoritative declaration of what is the law" of this District, notwithstanding the Maryland statute and decisions, as Mr. Justice Strong held was Judge Cooley's declaration as to the Michigan law.

There can be, I think, little doubt that this judicial expression of opinion as to the validity in this District of a marriage per verba de presenti should govern, instead of the contrary finding made by the courts of Maryland, and notwithstanding the statute of February 27, 1801, declaring that the laws of Maryland then existing should be and continue in force in said District.

I am aware of the holding that the decisions of the courts of a State construing a law of that State are ordinarily binding upon the courts of other jurisdictions; and the Supreme Court of the United States held in the case of *Meister v. Moore*, cited, that the holding of the Michigan supreme court as to the validity in that State of marriages per verba de presenti is binding upon the United States Supreme Court.

But the question herein is not one of statutory construction of a local law as to a matter of local interest merely. The statute of Maryland of 1777 as to marriages requires no construction; its import is plain, direct, and unambiguous, and the question is merely one of fact as to what was the common law on the subject of marriages without celebration. That this fact is a legal fact, a fact of law, does not change the nature of the consideration.

It is, therefore, the province of the court in such case to determine, not what marriage is, but what the common law held it to be; and such question is peculiarly and especially one for the courts of this District to decide as to marriages within the District, the supreme court of the District having "general jurisdiction in law and equity," and being also an appellate court. (Act of March 3, 1863, 12 Stat., 762.)

Furthermore, marriage, the thing here in controversy, is not a matter of restricted interest, local to the State of Maryland, and one, therefore,

within the sole jurisdiction of the courts of that State. Marriage is a thing of common right, a right descended to us from the common law, and which can not, therefore, be abridged or curtailed or cut off except by express enactment of the legislative power (*Meister v. Moore*, cited), and the sole legislative power for the District of Columbia is Congress (*Loughborough v. Blake*, 5 Wheat., 317; *Williard v. Presbury*, 14 Wall., 676), which has enacted no law in anywise abridging this common right of marriage, unless it be considered that the act of February 27, 1801, declaring the laws of Maryland shall be in force in the District does so.

Said act, however, contains no express inhibition as to marriages; nor does the act of 1777 of the Maryland laws and the Supreme Court of the United States, in the same authoritative case of *Meister v. Moore*, so frequently cited herein, holds not only that a marriage *per verba de præsenti* was valid at common law, but that such a marriage is valid in any part of this country notwithstanding a statute of the State may provide for celebration, license, etc., unless such statute declares also that marriage without such celebration or license shall be invalid and void.

The Supreme Court states also in this case that there can be "no doubt" that such marriages (*per verba de præsenti*) were valid at common law "in view of the adjudications made in this country from its earliest settlements to the present day." (See also *State of Maryland v. Baldwin*, 112 U. S., 490; 1 Bishop on Mar., Div., and Sep., sec. 410.)

The District of Columbia being national territory, from which fact Bishop concludes that "the laws of marriage and divorce there prevailing are national" (1 Mar., Div., and Sep., sec. 156), this declaration by the highest federal judicial authority as to what the common law was would seem of itself to be well-nigh conclusive, in this country at least, on the question in this jurisdiction, and is a strong confirmation of the finding made by the supreme court of the District; and the early Maryland case of *Cheseldine v. Brewer*, cited above, decided prior to the Maryland statutes of 1777, although it has been lately overruled as stated, stands in line with the holding by the United States Supreme Court and by the supreme court of the District.

There being, therefore, no statute, either of Maryland or of the District, declaring a marriage *per verba de præsenti* invalid and void; and in view of the holding of the United States Supreme Court and of the supreme court of the District that such a marriage was valid at common law, and of the holding by the former court that it is valid in any State in this country where the statute does not declare it to be invalid, and of the holding by the latter court that the holding of the courts of Maryland on the question of the validity of such marriages at common law is not binding on the courts of this jurisdiction, I am constrained to hold that a marriage *per verba de præsenti* is valid in this District; and the decision in *Fanny Curtis* (2 P. D., 159) is approved as to this question.

Your action in the widow's claim is, therefore, reversed, and you will please readjudicate the claim accordingly, to determine whether such a marriage existed in this case.

MARRIAGE—DISTRICT OF COLUMBIA—IOWA.

MARIA MCCARTHY (WIDOW).

1. A statute regulating the forms of marriage is merely directory, and, unless it contains an express clause of nullity, a marriage valid at common law is valid under such a statute.
2. The statutes in force in the District of Columbia contain no express clause of nullity, and a marriage valid at common law is valid in the District of Columbia.
3. A marriage valid at common law is valid in the State of Iowa. See case of Annie Dennis (9 P. D., 243).

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
January 31, 1899.*

Maria, widow of Daniel McCarthy, late private in McDermott's company, Fifth Battalion District of Columbia Infantry, by her attorney, March 5, 1898, filed a motion for reconsideration of departmental decision of August 22, 1896, affirming the Bureau action of December 18, 1895, rejecting her widow's claim, No. 618691, filed July 18, 1895, under the act of June 27, 1890, on the ground that she was not the legal widow.

It is contended that a valid marriage is proved; that the parties, by mutual agreement, agreed to live together as man and wife in the District of Columbia in 1864; that they did so live and cohabit for about thirty years, twelve years in the District of Columbia and about seventeen years in the State of Iowa; that one child was born as the issue of said marriage, who died and was buried in Mount Olivet Cemetery February 20, 1897, and that the evidence shows a valid common-law marriage under the laws of the State of Iowa.

Soldier enlisted April 18, 1861, and was honorably discharged July 18, 1861. He died in Washington, D. C., May 17, 1895.

The only question involved in the appeal is the question of the validity of claimant's marriage to soldier.

Several affidavits were filed with the appeal, tending to show a valid common law marriage in the State of Iowa, and in view of this fact the case was reopened by departmental decision of July 15, 1898, and the papers returned, under rule 3 of the First Division of Rules of Practice, to enable the Bureau to first pass upon the new and material evidence.

The papers are now returned with a report of the law division, dated August 29, 1898, in which, after setting forth the testimony as to continuous cohabitation of the parties as husband and wife in the Dis-

trict of Columbia twelve years, and in the State of Iowa for some seventeen years, concludes as follows:

Upon these facts the contention is based that a common-law marriage has been established under the State of Iowa, but as these parties began cohabitation as husband and wife in the District of Columbia, and with the exception of the time they were domiciled in Iowa they lived together as such husband and wife for some eight years in Washington, D. C., preceding the soldier's desertion and death in 1895, the validity, therefore, of this marriage must be construed under the laws of the District of Columbia instead of those of the State of Iowa, in accordance with the provisions of section 2 of the act of August 7, 1882, amending section 4702 of the Revised Statutes, which provides:

"That marriages, except such as are mentioned in section 4705 of the Revised Statutes, shall be proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time of the marriage, or at the time when the right to pension accrued." * * *

After a careful review of the evidence in the case, I am constrained to hold that a common-law marriage has not been established, as such marriages are not recognized in the District of Columbia; and the opinion of the division of December 13, 1895, holding that the claimant is not the legal widow of the soldier, is accordingly adhered to.

Without repeating the testimony at length, it may be briefly recapitulated as follows:

Claimant, who was a widow with two young children, assumed matrimonial relations with soldier in the District of Columbia in 1864 or 1865; that the issue of said alleged marriage was a son, born in Washington, D. C., prior to their removal to the State of Iowa, and named, after the soldier's father, Jeremiah McCarthy; that in the latter part of 1866 soldier removed to Iowa, taking claimant and their said child with them, where the child soon died; that the claimant returned to Washington with the body of her child for burial; that the funeral services of the child were held in St. Aloysius parish, and the child was buried in Mount Olivet Cemetery, February, 1867; that soldier remained in Iowa, and after the funeral of her child claimant returned to him in that State, where she continued to live and cohabit with him as his wife up to about 1885 or 1886, when, soldier having secured a Government appointment, they returned to Washington, D. C., where soldier purchased a house and placed claimant in charge of it as his wife; that while in Iowa soldier bought and sold real estate, and that in the sale she was recognized as his wife; that in less than a year before his death, in 1894, soldier deserted claimant and denied a common-law marriage and claimed that they were never legally married; that from the time of their first cohabitation, in 1864 or 1865, to the date of his desertion, in 1893 or 1894, they had continuously conducted themselves as husband and wife; that they so represented themselves to their relatives, friends, and neighbors, and were so regarded by them and those with whom they had business relations.

If the testimony as to the relation of these parties is true, and there are no other facts tending to disprove their marital relation than the

desertion of the husband and his repudiation of a marriage in 1893 or 1894, a marriage valid at common law has been established under the laws of the State of Iowa, where marriage is held to be a civil contract, as the acts and conduct of soldier for over twenty-five years speak more convincingly than his act and language in 1893 or 1894.

Denial of marriage, being declaration in his own interest, is entitled to but little weight. (See *Greenawalt v. McEnelley*, 85 Pa., State Rep., 352.) A marriage by consent of the parties, followed by long and continuous cohabitation as husband and wife, is as valid and binding as a ceremonial marriage, unless the statute law of the place where the marriage was contracted in terms forbids such a marriage or declares them void. This neither the statutes of the District of Columbia nor the statutes of the State of Iowa do. See statutes of Maryland of 1777, chapter 12 (1 Kilty, 445-446), which by the act of Congress approved February 27, 1801 (2 Stat. L., 103), were continued in force in that part of the District ceded by Maryland to the United States. See also chapter 30 of Compiled Statutes, in force in the District of Columbia, compiled by Albert & Lovejoy in 1894, pages 271, 274.

Section 4 of said chapter 30, Compiled Statutes of the District of Columbia, page 272, provides who shall "celebrate the rights of marriage" in the District, and section 6 of said chapter 30 provides that "no person shall marry within this District without such a license as by this act is directed * * * under a penalty of £500 current money," and section 7 (*ibid*) provides the same penalty for those "persons belonging to this District who shall go out of this District and there marry with any person belonging to this District contrary to this act," but neither of these sections provides that a marriage valid at common law shall be invalid, or that marriage between parties who do not "celebrate the rites of marriage" or who fail to procure a license shall be void; but, on the contrary, section 12 of said chapter 30 clearly implies their validity and legality by providing the class of marriage which may be declared valid by the court, and enumerating only those marriages contrary to section 2 of the chapter which enumerates the prohibited degrees of kindred or affinity and second marriage where the first was subsisting.

To deny the "celebration of the rites of marriage" except by the clergy, or according to the ceremony of certain churches, is not to deny the right of marriage, which is a natural right, and older than the statutes.

The Maryland statute of 1777, and chapter 30 of the Compiled Statutes, in force in the District of Columbia, were amended by the act of May 13, 1896, which provided that marriage in the District of Columbia may be celebrated by the judge of any court of record, or any justice of the peace, and section 4 of the act provides that—

No marriages heretofore solemnized shall be deemed or adjudged to be invalid, nor shall the validity thereof be in any way affected on account of any want of authority in any person solemnizing the same, if consummated with a full belief on the

part of the persons so married, or either of them, that they were lawfully joined in marriage.

The act also reduced the penalty imposed upon the person who failed to comply with the provisions of the act from £500, as provided in said chapter 30, to "not less than \$50 nor more than \$250."

I have been unable to find a single case that has ever decided that a common-law marriage in the District of Columbia was void, or that the want of a license or the absence of clergy was fatal to the validity of a marriage consummated by consent and cohabitation between persons competent to marry.

The United States Supreme Court held, in the case of *Blackburn v. Crawfords* (3 Wall., 175), that a marriage celebrated in the District of Columbia by a clergyman, in the presence of the church, was not invalid for want of a license, and that, in their view, a marriage *per verba de presenti* did not arise. In that case the evidence showed that the marriage was celebrated in a church by the assistant minister of the church, and for that reason the question of whether there was a common-law marriage became immaterial.

If in view of the provision of section 6 of said chapter 30, Compiled Statutes of the District of Columbia, 272, that "no person within this District shall marry without such license, as by this act directed," a marriage without such license is valid, as was held by the United States Supreme Court in said case of *Blackburn v. Crawfords*, in 1865, on what theory can it be argued that a marriage *per verba de presenti* would be void if the rite of marriage was not celebrated by a minister, as required by section 4 of said chapter 30? The provision of the statute in relation to the necessity for a license is more arbitrary and vindictory than the provision which requires the marriage ceremony to be celebrated by the clergy, as in the latter case no punishment is prescribed for the persons who marry without religious ceremony, although the person who celebrates the rite of marriage, contrary to the true intent and meaning of section 4 of said chapter 30, is required to forfeit and pay, for every offense, £500, current money, while under said section 6 the person who shall marry without a license is subject to the same fine, as well as the minister who shall marry any person without a license.

If therefore a marriage without a license is not void for want of a license, it follows that a marriage without the rite being celebrated by a clergyman would not be void for want of such celebration, and the reason is that all such and similar statutes are directory merely, and while the parties violating the statute are subject to punishment provided in the statute, a marriage valid at common law or a marriage *per verba de presenti* is not invalid unless the statute prescribes an express clause of nullity.

As stated by Greenleaf on Evidence, vol. 2, par. 460:

Marriage is a civil contract by the law of nations, to the validity of which the consent of parties able to contract is all that is required by natural or public law. If

the contract is made per verba de presenti, though it is not consummated by cohabitation, or if it be made per verba de futuro, and to be followed by consummation, it amounts to a valid marriage in the absence of all civil regulation to the contrary. And though in most, if not all, the United States there are statutes regulating the celebration of the marriage rites and inflicting penalties on all who disobey the regulations, yet it is generally considered that in the absence of any positive statute declaring that all marriages not celebrated in the prescribed manner shall be absolutely void, or that none but certain magistrates or ministers shall solemnize a marriage, any marriage regularly made according to the common law, without observing the statute regulations, would still be a valid marriage.

This is the general doctrine accepted and cited by Mr. Justice Strong in the case of *Meister v. Moore* (96 U. S., 76), citing also *Parton v. Henry* (1 Gray Mass., 119); *Bishop on Marriage and Divorce*, section 283, et. seq.; *Reeve's Domestic Relation*, 199, 200; 2 Kent Com., 90, 91, and *Hutchins v. Kimmell* (31 Mich., 126). See also *Proctor v. Bigelow* (38 Mich., 282).

The case of *Hutchins v. Kimmell*, cited and followed by the Supreme Court of the United States, and cited as authority by American courts and text writers generally, holds that marriage between parties capable of contracting it is of common right and valid by a common law prevailing throughout Christendom; that regulations restrictive of it or imposing conditions upon it are exceptional; that they depend on local statutes, and, as in all other cases of exceptions, if one claims that a case falls within the exception, the burden of proof is upon him to show the fact; that, prima facie, a good marriage is shown when the contract is proved with cohabitation following it, and we can not assume that there are regulations restrictive of the common right until they are shown. The opinion of the court in that case was rendered by Justice Thomas M. Cooley, and the suit was an action in case for criminal conversation. The marriage involved was a foreign one, alleged to have taken place in the Kingdom of Wurtemberg, and the court conceded that an actual marriage must be proved; that such evidence of cohabitation and reputation as would be sufficient in other civil actions would not suffice where it was sought to fix upon the woman the crime of adultery, citing authorities. It was contended that proof of ceremony alone was not proof of the marriage until the law was shown which would make it such; but the court held that proof of the ceremony of marriage did, prima facie, establish it, and affirmed the judgment of the circuit judge who had so held.

The court, often referring to the fact that stronger proof of marriage was required in that case than in a case involving property rights merely, state as follows:

But had the supposed marriage taken place in this State, evidence that a ceremony was performed ostensibly in celebration of it, with the apparent consent and cooperation of the parties, would have been evidence of a marriage, even though it had fallen short of showing that the statutory regulations had been complied with, or had affirmatively shown that they would not. Whatever the form of ceremony, or even if all ceremony was dispensed with, if the parties agreed presently to take

each other for husband and wife, and from that time lived together professedly in that relation, proof of these facts would be sufficient to constitute proof of a marriage binding upon the parties, and which would subject them and others to legal penalties for a disregard of its obligations. This has become the settled doctrine of the American courts, the few cases of dissent or apparent dissent being borne down by a great weight of authority in favor of the rule as we have stated it. *Fenton v. Reed* (4 Johns., 52); *Jackson v. Winne* (7 Wend., 47); *Starr v. Peck* (1 Hill, 270); *Rose v. Clark* (8 Paige, 574); *Matter of Taylor* (9 Paige, 611); *Clayton v. Wardell* (4 N. Y., 230); *Cheney v. Arnold* (15 N. Y., 345); *O'Gara v. Eisenlohr* (38 N. Y., 296); *Pearson v. Howey* (6 Halst., 12); *Hantz v. Sealy* (6 Binn., 405); *Commonwealth v. Stump* (53 Penn. St., 132); *Newbury v. Brunswick* (2 Vt., 151); *State v. Rood* (12 Vt., 336); *Northfield v. Vershire* (33 Vt., 110); *Duncan v. Duncan* (10 Ohio, N. S., 181); *Carmichael v. State* (12 Ohio, N. S., 553); *State v. Patterson* (2 Ired., 346); *London-derry v. Chester* (2 N. H., 268); *Keyes v. Keyes* (2 Fost., 553); *Bashaw v. State* (1 Yerg., 177); *Grieham v. State* (2 Yerg., 589); *Cheeseldine v. Brewer* (1 H. & McH., 152); *State v. Murphy* (6 Ala., 765); *Potier v. Barclay* (15 Ala., 439); *Dumaresly v. Fishly* (3 A. K. Marsh., 368); *Graham v. Bennet* (2 Cal., 503); *Case v. Case* (17 Cal., 598); *Patton v. Philadelphia* (1 La. Ann., 98); *Holmes v. Holmes* (6 La. R., 463); *Hallett v. Collins* (10 How., 174).

In the case of *Proctor v. Bigelow* (38 Mich., 283) Chief Justice Campbell announced as the generally accepted rule as to proof of marriage in civil cases, that "marriage is provable by conduct and reputation."

In that case the evidence to prove marriage consisted of the testimony of the son of the widow, showing that she and his father had lived together and brought up a large family, treated each other on all occasions as husband and wife, were so reputed by the family and others, addressed each other as such, and jointly signed papers in that relation, and this was held sufficient proof of marriage, the court citing 1 *Starkie Ev.*, 45; *Hutchins v. Kimmel* (31 Mich., 126); 2 *Greenleaf's Ev.*, par. 462; 3 *Edwards edition Phillips Ev.*, 599, and cases therein cited. See also *Brinkley v. Brinkley* (50 N. Y., 185); S. C. (10 Am. Rep., 460); and *Haynes v. McDermott* (82 N. Y., 41); S. C. (37 Am. Rep., 538).

In the statutes of Iowa (which provide that marriages solemnized, with the consent of parties, in any other manner than as prescribed by the statute, shall be valid, but that the parties shall forfeit to the school fund the sum of \$50 each), marriage is recognized as a civil contract, and a common-law marriage or a marriage without solemnization is valid.

See section 2526 of the Iowa Code, and *Blanchard v. Lambert* (43 Iowa, 228), followed by this Department in the case of *Annie Dennis* (9 P. D., 243).

If, therefore, the ex parte evidence of claimant and her witnesses in this case correctly state the facts, and there is no other fact tending to disprove her marital relation with soldier than his conduct and statement in 1893 or 1894, it follows that a marriage valid at common law has been established under the laws of both the District of Columbia and the State of Iowa.

The action appealed from is accordingly reversed, and the case

remanded for a special examination for the purpose of testing the truthfulness of the witnesses who have testified in behalf of claimant, and verifying the facts as testified to by them as to conveyance of property, conduct and cohabitation.

MINOR'S PENSION—ACTS OF JUNE 27, 1890, AND AUGUST 7, 1882.

MINOR OF ALLEN BIGGERS.

Where the applicant is claiming as the minor child of soldier by a former wife, deceased, contending that the surviving widow has never been charged with care and maintenance of the claimant, the rejection of the claim on the ground that the soldier left a surviving widow who is unmarried is not responsive to the question presented, nor determinative of claimant's right.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
February 13, 1899.*

Fannie Hyde, guardian of Pearl Biggers (minor child of Allen Biggers, deceased, late private, Company E, One hundred and twenty-third United States Colored Volunteer Infantry), by her attorneys, appealed December 8, 1898, from the Bureau action on her minor's claim, No. 680734, filed August 8, 1898, under section 3 of the act of June 27, 1890, on the ground that soldier left a widow who is now living, and who has not remarried.

The question raised in this case, and on the appeal, is, that the widow is not the mother of claimant, and has forfeited her title to pension by a violation of section 2 of the act of August 7, 1882, and that she has never had the care and custody of claimant.

Soldier enlisted November 19, 1864, and was honorably discharged October 16, 1865. He filed his first application for pension June 1, 1891, under the act of June 27, 1890, which was allowed by Bureau action of April 16, 1894, and he was pensioned at \$6 per month for rheumatism and resulting disease of heart, which rate was increased to \$12 per month from October 21, 1896.

He died July 28, 1898, leaving, as is alleged, a minor child born September 7, 1886, as the issue of his first marriage alleged to have been contracted in the spring of 1866. It is alleged that his first wife died August 8, 1888; that he contracted a second marriage November 19, 1889, and that this wife is still surviving and unmarried.

The claim was adjudicated without a special examination. The widow has filed a release of her claim to pension.

Where the applicant is claiming as the minor of soldier by a former wife, deceased, contending that the surviving widow has never been charged with care and maintenance of the claimant, the rejection of the claim on the ground that the soldier left a surviving widow who is

unmarried is not responsive to the question presented, nor determinative of claimant's right.

The Bureau reported February 3, 1899, that if the papers be returned the case will be sent to the field to determine whether the widow has forfeited her rights as alleged.

I am of the opinion that where the question involved, as in this case, is the alleged violation of the last paragraph of section 2 of the act of August 7, 1882, the case should be specially examined prior to adjudication, even though the widow filed a release of all claims to pension.

As that course was not taken in this case, the action appealed from is reversed, and the papers in the case are herewith returned.

DISLOYALTY—SECTION 4716, REVISED STATUTES.

PETER WALTHER.

Prisoner of War Records show that pensioner was paroled for services in the engineer workshops at Savannah, Ga., late in October, 1864, and continued to perform labor in said shops until his final parole, November 18, 1864, thus voluntarily aiding and abetting the rebellion against the authority of the United States. Under the provisions of section 4716, Revised Statutes, he is not entitled to pension, and the dropping of name from the rolls was proper.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
February 20, 1899.*

Peter Walther, late of Company A, Fourth New York Cavalry, first claimed a pension May 23, 1888, alleging that he incurred a gunshot wound of the right side of the head in battle, and while a prisoner of war he contracted chronic rheumatism, neuralgia of head, causing total loss of hearing in left ear, lameness of legs, disease of kidneys, and asthma. This claim was rejected June 27, 1890, on the ground that claimant rendered voluntary service to the enemy in the engineer shops at Savannah, Ga., while a prisoner of war, as shown by the records, and was thereby barred from title to pension under section 4716, Revised Statutes.

The case was reopened June 10, 1891, under a decision which had been rendered September 27, 1890, upon the appeal of Russel S. Cole (4 P. D., 141). In the meantime, however, claimant had filed, September 18, 1890, an application for pension under the act of June 27, 1890. This was allowed September 3, 1891, at \$12 per month. Subsequently the decision in the Cole case was overruled, and, after due notice to the pensioner, his name was dropped from the rolls June 20, 1896, upon his record, which shows that he changed his condition as prisoner of war for service in the engineer workshops at Savannah, Ga., thus coming under the prohibition of the section above mentioned.

Appeal from this action has been entered August 8, 1898, in which these contentions are made: First. It is denied that the pensioner ever rendered such service as that referred to in the record, but it is possible that some other soldier, assuming his name, did render it. Second. But if it be admitted that he did work in the shops at Savannah, Ga., it was not voluntarily done, because, as the record shows, he, with others, was compelled to do said work, and hence he was not disloyal in the sense contemplated by section 4716, Revised Statutes. There is cited the report contained in the record, by Lieut. Col. John J. Clarke, of the engineer department, Confederate States Army, and the order No. 277, dated November 22, 1864, and issued by the War Department of the Confederate States, in pursuance of the request of Colonel Clarke, for the retention of the prisoners in said work; also a general order, No. 100, of the War Department of the United States, in reference to the treatment of prisoners, and stating that they may be required to work for the Government. Accompanying the appeal, or filed in support of it, are some arguments based on the history of the claimant in the service and the circumstances under which he performed labor for the Confederate Government, as well as the citation of the authority, sanctioned by international law, for requiring such labor.

As showing clearly the basis on which the adverse action was taken, the reports from the War Department are here given in full. The first report was dated September 6, 1888, and is as follows:

Peter Walter, a private of Company A, 4th Regiment New York Cavalry Volunteers, was enrolled on the 10th day of August, 1861, at New York, 3 years, and is reported: On roll September and October, 1861, present; same to October 31, 1863; November and December, 1863, absent prisoner, November 8, 1863; same to June 30, 1864. Detachment muster-out roll, dated September 23, 1864, at Harpers Ferry, Virginia, reports him "prisoner of war at Raccoon Ford, Virginia, since September 16, 1863."

Mustered out on individual muster-out roll dated March 15, 1865, at New York City, to date January 31, 1865, with remark, "Prisoner of war November 9, 1863–November 19, 1864." Regiment was in action at Raccoon Ford, September 16, 1863. Not borne as Peter Walther.

Prisoner of War Records show him captured at Warrenton, Virginia, November 11, 1863; brought from Gordonsville, Virginia, and confined at Richmond, Virginia, November 17, 1863, where he was admitted to hospital No. 21, November 26, 1863, with "Feb. Int." Ret'd to qrs. November 28, 1863; sent to Andersonville, Ga., March 6, 1864. (While prisoner of war at Savannah, Ga., was paroled by Genl. McLaws for service in engineer workshops at Savannah, Ga., where he is "now," October 25, 1864, employed; above detail approved by S. O. 277, A. and A. G. O., November 22, 1864, Richmond, Virginia.) Paroled at Savannah, Ga., November 18, 1864. Rept'd at College Green B'ks, Md., November 25, 1864. Sent to Camp Parole, Maryland, where he arrived November 24, 1864; furloughed December 5, 1864, for 30 days; returned January 5, 1865; sent to New York City (place of enrollment) January 31, 1865. No other evidence of disability on said records. Name does not appear upon the records of Andersonville, Ga., on file in this office. The records of Savannah, Ga., are not on file in this office.

Records furnish no evidence of alleged wound and no further evidence of disability.

The War Department then furnished, under date of November 6, 1895,

a copy of the order, No. 277, referred to in the foregoing statement from "Prisoner of War Records," as follows:

ADJUTANT AND INSPECTOR GENERAL'S OFFICE,
Richmond, November 22, 1864.

SPECIAL ORDERS, }
No. 277. }

LV. Lieutenant-Colonel John J. Clarke, chief engineer, Department South Carolina, Georgia, and Florida, is allowed to retain the following prisoners of war on their parole as mechanics in the engineer workshops at Savannah, Georgia:

Private Peter Walter, Company A, Fourth New York.

By command of the Secretary of War:

JNO. WITHERS,
Assistant Adjutant-General.

In response to a request for further information another report, dated May 14, 1898, was furnished, as follows:

Respectfully returned to the Commissioner of Pensions, with a copy of a descriptive list of paroled prisoners employed at the Engineer Department Iron Works, Savannah, Ga., including the indorsements thereon. No information has been found relative to the parole of Peter Walter, Company A, Fourth Regiment New York Cavalry, for service in the engineer workshops at Savannah, Ga., additional to that contained in the inclosed report of this office dated September 6, 1888, and in the descriptive list, a copy of which is herewith transmitted. Attention is also invited to the copy of Special Orders, No. 277, paragraph 55, Adjutant and Inspector General's Office, dated at Richmond, Va., November 22, 1864, a copy of which was furnished the Commissioner of Pensions in this case November 6, 1895.

The copy of descriptive list mentioned includes thirty-nine names of prisoners, including that of claimant, with the companies and regiments to which they belonged, and followed by these remarks:

Forty-six received from stockade. Five returned. Ten died; yellow fever. Thirty-nine remaining this date, October 25, 1864.

The indorsements on said descriptive list are the following:

[First indorsement.]

OFFICE CHf. ENG. DEPT., S. C., GA. AND FLA.
Charleston, October 26, 1864.

Respectfully forwarded to engineer bureau with the statement that these men were paroled by Gen. McLaws for service in the engineer workshops in Savannah while the prisoners were confined in that city. The gang to which they belonged have now been removed to Camp Lawton..

It is respectfully requested that permission be obtained from the Hon. Sec. of War to retain these men at work on their parole to confine themselves to prescribed limits and hold no intercourse with the enemy.

These men enlisted for bread, and would much rather work than fight for it. I would much prefer their parole to any oath of allegiance which would give them the rights of citizens. Citizens are very scarce, and these men are valuable to us and are anxious to continue at work.

JNO. J. CLARKE,
Lt. Col. and Chf. Eng. Dept.

They will be under the guard of the engineer company with whom they work and with whom they will be quartered.

JNO. J. CLARKE,
Lt. Col. Engrs.

[Second indorsement.]

ENGINEER BUREAU, *November 1, 1864.*

Respy. referred to the Hon. Sec. of War with the recommendation that Col. Clarke be allowed to retain these prisoners, on their parole, as mechanics in the engineer workshops at Savannah as heretofore.

J. F. GILMER,
Maj. Gen. and Chf. Eng. Bur.

[Third indorsement.]

A. G. :

Order in conformity with Genl. Gilmer's suggestion in above endorsement.

J. A. S.

1 Nov. /64.

[Fourth indorsement.]

Resp. referred to Chief of Engineer Bureau. Attention called to the endorsement of Sec. of War.

By order A. and I. G. O. :

ED. A. PALFREY,
A. A. Genl.

A. and I. G. O., Nov. 18/64.

[Fifth indorsement.]

ENGINEER BUREAU, *Nov. 21, 1864.*

Res. returned A. and I. Genl. with the request that the order issue from his office as directed by Sec. of War.

J. F. GILMER,
Maj. Genl. and Chf. Eng. Bur.

In support of his strenuous denial that he did any work in the shops at Savannah, Ga., the claimant has furnished several detailed statements concerning his prison life, showing that he was first confined at Richmond, Va., to January, 1864, then at Belle Isle prison, Virginia, till March, 1864, then was sent to Andersonville, Ga., remaining there until late in October, 1864, when sent to Savannah, where he remained in prison until sent North on parole November 17, 1864. The testimony of two comrades is furnished in support of the material part of his statements, one of these affirming that claimant never left the prison in Savannah after arriving there until he went aboard the vessel to go North. The other witness merely states that the prison at Andersonville was broken up about the middle of October, 1864, and claimant, with other prisoners, was sent to Savannah. This statement is probably very nearly correct, although the record does not show the exact date of the removal of prisoners to Savannah. Covering the period of claimant's prison life up to this time (the middle of October, 1864), the evidence of himself and his comrades is not materially at variance with the record. It is only in the matter of his detail by parole for work in the engineer workshops that he denies the correctness of the record.

But such denial, sustained only by the general statement of one witness, can not be accepted to outweigh the record, which was made at the time of the occurrence of the disputed event. The presumption is

altogether in favor of the correctness of said record. Besides, claimant's denial is but half-hearted at best, because, as already noted, the appeal states "but if it be admitted that claimant is the man referred to in the record," etc., then it is denied that the work was voluntary. Nor is the suggestion that another assumed claimant's name and did the work mentioned in the record worthy of serious attention. Claimant was present with the prisoners, and it is most unlikely that another could have personated him in a matter of this character, even if, as he claims, the detail was compulsory in its nature, while, if made from volunteers, it could hardly have included a substitute for claimant without the knowledge of himself and the officers in charge. So that the first contention of the appeal fails for lack of evidence or reason to support it.

Then the consideration recurs to the second contention, that the work performed was compulsory and not voluntary on the part of the claimant. And here again it may be stated, as a preliminary remark, that the presumption favors the correctness of the record. In the appeal, and in the arguments touching various features of the case, it appears to be conceded that if claimant was paroled—if he and others did perform work, as indicated, and gave their promise "to confine themselves to prescribed limits and hold no intercourse with the enemy," as stated in the communication of Lieutenant-Colonel Clarke, then there was substantially rendered the voluntary aid and support of the rebellion for which section 4716, Revised Statutes, prohibits the payment of pension. At any rate this is true, whether the concession was intended to be made or not, because the mere fact of such promise or parole carries with it the idea of the voluntary acceptance of the terms imposed. But it is denied that any such parole was given. On the contrary, as insisted, whatever work was done under this detail to the engineer workshops was under constraint, as evidenced by the fact that these prisoners were constantly surrounded by military guards, whether at work or not; that the Confederate officer was opposed to administering the oath of allegiance to them; that their work was needed for the benefit of the captor's government, and under the laws of war their services in such work could be impressed, whether they were willing or not.

Considering these points in their reverse order, it may be stated that there is no need to question the authorities cited for sustaining the contention that the Confederate government had the right, under the law of the nations as recognized at that period, to compel prisoners of war to perform certain kinds of work, such as repairing roads and bridges, building fortifications, carrying provisions, or such work as these prisoners did in a shop. This quotation is made from a note to Vattel by Pradier-Fodere:

Under officers and soldiers may be employed on public works to compensate in part for the cost of keeping them.

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It is also noted that in the General Orders of the War Department, No. 100, section 3, paragraph 76, it is announced as a part of the laws of war that prisoners of war—

May be required to work for the benefit of the captor's government, according to their rank and condition.

And the Special Order, No. 277, from the Confederate war office, already quoted from the Prisoner of War Records, is cited as showing that this right to require work from prisoners was mutually recognized by the parties to the conflict.

There has been filed with the case some advanced sheets from the Rebellion Records relating to prisoners of war, soon to be published, in which occurs, among other things, a correspondence between Q. M. Gen. M. C. Meigs and Dr. Francis Lieber, who is stated to be the author of the General Orders, No. 100, above mentioned. This correspondence took place in January, 1864. General Meigs mentions the fact that under the authority of paragraph 76 quoted from these general orders he had advised the employment of 6,000 rebel prisoners about Chattanooga, Tenn., upon certain public works, and states the reasons which moved him, among them being that the prisoners themselves would be better off at work than in idleness and confinement. He states, however, that his recommendation was overruled by higher authority on the ground of expediency. Dr. Lieber, in his reply, indorses all the reasons and suggestions of General Meigs, quotes precedents, and discusses the subject at some length, concluding that there is full authority in the laws of war for compelling prisoners to perform certain kinds of work.

As before intimated, there is no cause for disputing this high authority as to the right of the captor to impress the services of prisoners in the manner mentioned. Whether as a matter of policy or expediency this was done to any considerable extent by either side in the war of the rebellion there are no data at hand for determining. But wherever it is positively shown service or work was required of prisoners against their will they will not be regarded as coming under the operation of section 4716, Revised Statutes. Some former decisions sustain this position in regard to service in the Confederate army, but there seems to be no published decision in which the issue related to work performed by prisoners of war. The particular question raised in this case has been seldom, if ever, before the Department for consideration. It is controlled, however, by the same principle as governs in cases of service, and the following headnotes of decisions will show how the matter has been regarded in the latter class of cases:

Compulsory service, under the conscription laws of the Confederacy, in the rebel service, from which the soldier deserted at his first opportunity and joined the Federal service, in which he was killed, does not forfeit his mother's right to pension. (Mother of Frederick Thatcher, 7 L. D. P., 119.)

A claimant who was conscripted into the Confederate army may or may not have

rendered voluntary service, and where from the record it appears that any service rendered was not voluntary, but wholly compulsory, he is excepted from the operation of section 4716, Revised Statutes. (Augustus H. Lougee, 7 P. D., 586.)

Involuntary service in the Confederate army by a conscript does not bring a claimant for pension within the provisions of section 4716, Revised Statutes. Appellant was 22 years old when he entered the Confederate service. The age limit of the conscription law of the Confederacy, of April 1, 1862, was from 18 to 35 years; that of September, 1862, 18 to 45 years, and of the law of February, 1864, from 17 to 50 years, and the appellant was subject to conscription as alleged and shown. (Isaac N. Babb, alias John Dunlap, 8 P. D., 59.)

Touching the contention that the record shows the Confederate officer expressed opposition to administering the oath of allegiance to prisoners, and that their work as mechanics was valuable to the Confederate government, and therefore the presumption obtains that such work was required without the consent of the prisoners, it may be stated that the record also shows that the prisoners thus detailed were anxious to continue at the work, and the more reasonable presumption is that there was some advantage to them in the matter of food and quarters, or otherwise, over the confinement within the prison stockade, for which they readily consented to perform this work. The harsh comment of the officers that "these men enlisted for bread and would rather work than fight for it," may have been wholly gratuitous and unwarranted, but it is not likely that only a few of the men would have been forced to labor against their will, notwithstanding the right and power to do so. Dr. Lieber, in the letter already mentioned, states:

I have known officers or other educated persons being used for writing, etc. Of course if they objected they could not well be forced to do such work, but then it would not have been to their advantage to do so. The liberty of the street would probably have been taken from them.

If all the prisoners or any considerable number of them had been put to work under an armed guard, and the record had made no reference to a parole, it might be readily presumed that there was compulsion, but in this case it is shown that a limited number were placed at work in the shops; that the only guard was the engineer company with whom they worked and were quartered, and that they were detailed only after a parole was given "not to go beyond prescribed limits or hold intercourse with the enemy." That such a parole was given can not be doubted, notwithstanding claimant's denial. It is most improbable that the detail would have been made without it, and most record is plain that such was a fact. It has been already stated that the bare denial of claimant and one comrade is not sufficient to discredit this record. As is well known, the uniform practice has been to sustain such a record unless contradicted by the most positive and unmistakable proof.

Nor is it necessary, in order to show that the record doubtless states the truth, to inquire particularly into claimant's motive for giving this parole, although, as before intimated, there were probably good reasons

for his doing so. In the testimony filed to show that claimant contracted the disabilities he alleges while in prison, it is stated by comrades that he, with others, suffered from neglect, starvation, illtreatment, and exposure to the elements while a prisoner, and this being true, it may have been, as before suggested, with the purpose of securing relief from these hardships that he consented to perform the work in the shops. Here, at least, he shared the same food and quarters as the rebel troops or workmen, and was otherwise benefited, especially in having needed exercise, more liberty of action, and less exposure. If it is claimed that the work with such incentive was still in the nature of compulsory labor, and that claimant had no purpose to desert his own country's cause, or enlist with the enemy, or do more than seek the preservation of his life and health, it is nevertheless a fact that the work he did was a distinct benefit and advantage to the Confederates, as admitted in the appeal, and for this reason it must be regarded as voluntarily aiding and abetting the late rebellion against the authority of the United States.

It has been stated that the allowance of this claim in the first instance was by virtue of a decision in the case of Russel S. Cole (4 P. D., 141), wherein it was held that a soldier who enlisted in the Confederate service for the purpose of escaping from imprisonment and seeking an opportunity of rejoining his own command was not voluntarily engaging in or aiding and abetting the rebellion, but that and all similar decisions were distinctly overruled, and the former ruling reestablished, which held that confinement and hardships in prison were not sufficient as an excuse for enlisting or serving in the Confederate service. No more is the purpose to escape such a state of hardship as is shown in this case a good reason for claimant to have voluntarily aided and abetted the rebellion by working in the shops at Savannah, Ga.

Viewed in the light of all the evidence, and giving full weight to all the arguments presented, the conclusion seems unavoidable that the record is correct in stating that the claimant was detailed to this work upon his parole; that, therefore, he voluntarily aided and abetted the rebellion against the authority of the United States, and is thus brought within the provisions of section 4716, Revised Statutes, prohibiting payment to him of a pension. The action in his case is accordingly affirmed.

SERVICE—CIVILIAN EMPLOYEES—CONTRACT SURGEONS.

HARVEY E. BOWLES.

An acting assistant or contract surgeon is not pensionable under section 2 of the act of June 27, 1890.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
March 4, 1899.*

Harvey E. Bowles, late contract surgeon, on October 20, 1897, by his attorney, filed a motion for reconsideration of departmental decision of August 13, 1898, affirming the Bureau action of December 8, 1894, dropping his name from the rolls as a pensioner under section 2 of the act of June 27, 1890, on the ground that his military service was not such as is contemplated to entitle him to a pension under said act, and also affirming the Bureau action of March 28, 1896, rejecting his renewal claim (Certificate No. 675080), filed February 18, 1896, on the ground that claimant was never regularly enlisted or mustered into the service of the United States, and had no title under said act, citing the case of Andrew J. Shannon (7 P. D., 64).

It is contended that the opinion of the Attorney-General (19 Op., 533) should be binding upon this Department in this case (citing 5 Op., Atty. Genl., 97); and that as the Attorney-General in the 19 Op., 533, decided that claimant was within the provision of the proviso to Departmental Rule 10, of the Civil Service Commission, and within the statutory provision of sections 1094 and 4693, Revised Statutes, he should also be held by this Department to be within the provision of section 2 of the act of June 27, 1890.

I am of the opinion that the contention is not sound, and that the opinion of the Attorney-General cited is not authority in this case. In that case the Attorney General was passing upon the construction of a departmental rule. In this case the Department is passing upon the construction of a statute for the purpose of ascertaining the grantees or beneficiaries intended to be included in the phrase "all persons" as used in the second section of the act of June 27, 1890. In the case before the Attorney-General a liberal rule of construction was properly applied, while in cases of public grants the rule of strict construction applies. (See Sutherland on Statutory Construction, par. 378, and cases cited under note 4.) This rule applies to the construction of pension laws in ascertaining the class of beneficiaries included in the law; but when that is clearly ascertained or designated in the law, then the rule of liberal construction applies, as the pension laws are remedial in their character, and are based upon the public good or general welfare. (See Sutherland on Statutory Construction, chap. 15, p. 521, and cases cited.)

No persons, or class of persons, should be included under the language of the pension statutes granting pensions who do not come clearly within the plain intent and meaning of the language used.

As stated by Attorney-General Miller at page 535 (19 Op.), in quoting from Winthrop's Digest, page 102—

An acting assistant or contract surgeon was a physician under a special contract for his personal service as a medical attendant to the troops; " " " that they were amenable to the military jurisdiction when so employed with the Army in time of war, but they were civilians without military rank and status, and were not a part of the military establishment, and that when not serving with troops before the enemy they had no other relation to the military organization of the Government than that established by the terms of their contract.

The Attorney-General in his said opinion did not deny, or attempt to controvert, the fact that Dr. Bowles, the claimant in this case, was an acting assistant or contract surgeon and a civilian, but he based his opinion upon the ground that he was within the provisions of Rule 10, of the Civil Service Rules and Regulations, because he rendered service to the troops in the field, before the enemy, during the late war.

The language of Attorney-General Miller is as follows:

The orders issued to Dr. Bowles show beyond question that he was an acting assistant or "contract" surgeon rendering service to the troops in the field, before the enemy, during the late war.

It has already been decided, in an opinion of the late Solicitor-General Chapman, approved by Attorney-General Miller, of date November 19, 1889 (19 Op., 434), that the proviso of Departmental Rule X, here in question, was not limited in its application to persons who served during the rebellion in the Army of the United States, within the statutory definition of that term given in section 1094 of the Revised Statutes, and it was there held that the clerks and employees on the public buildings in Washington who were organized into companies under the direction of General Wadsworth, and who served in what was known as the "Quartermaster's Brigade," who were uniformed, armed, equipped, and drilled, and were employed in scouting and other duty, although not regularly enrolled and enlisted in the Army of the United States, and not honorably discharged from such enlistment within the technical meaning of that term as used with reference to the release of regularly enlisted soldiers in the Army of the United States, were nevertheless within the proviso of said Rule X, and must be held, within the language of that proviso, "to have served in the military service of the United States in the late war of the rebellion," and to have been honorably discharged therefrom.

It seems to me that it is not possible to distinguish in principle the case of the quartermaster's volunteers from that of the contract surgeons, provided the latter, as was the case with Bowles, took the place and performed the duties of regularly enrolled surgeons on the field and in the military hospitals. The proviso to Rule X is to be construed liberally, as a grateful recognition of patriotic service. If it had been the intention of the commissioners and the President, who approved the proviso, to have limited its operation to regularly appointed officers and regularly enlisted soldiers of the Army of the United States, it would have been easy to have so framed its terms, and the conclusion would have then been reached which Attorney-General Devens found necessary in his opinion of September 22, 1878 (16 Op., 147). Bowles served the Government of the United States as a surgeon from April, 1864, to July, 1866, and during that time there is no reason to suppose that his service was not as dangerous, his labor not as irksome, and the physical and mental strain upon him not as great as it was in the case of any regularly appointed surgeon of the Army engaged on the field of battle, in the military hospitals, or at military forts during the same period.

In the analogous case of pensions (for the principle upon which pensions are granted, and this proviso was inserted, is the same) we find that a contract surgeon

who was disabled by any wound or injury received or disease contracted in the line of duty, while actually performing the duties of assistant surgeon or acting as assistant surgeon with any military force in the field, or in transitu, or in hospitals, is entitled to receive a pension as a beneficiary under the pension laws. (See Rev. Stat., sec. 4693.) By opinion of September 26, 1882, Acting Attorney-General Phillips decided that a contract surgeon who was making his preparations to leave St. Louis for Cairo, Ill., there to go on duty as a contract surgeon, and who died from typhoid fever, was "in transitu" within the meaning of this provision. The same liberality of construction requires that Dr. Bowles should be held to have served in the military service of the United States, and, by the completion of his contract with the Government, to have been honorably discharged from such service.

Had the question as to whether civilians were included in the phrase "all persons" in section 2 of the act of June 27, 1890, been properly submitted to the Attorney-General, a different conclusion would undoubtedly have been reached.

The question was fully discussed by this Department in the recent case of John Laughlin (9 P. D., 466), in which it was held that—

The words "all persons" in section 2 of the act of June 27, 1890, are limited by the context to those persons who have been "honorably discharged" from "the military or naval service of the United States during the war of the rebellion," and do not include a person who served in the capacity of a civilian employee or as a nonenlisted person.

In that case as in this, the claimant was a civilian employee or non-enlisted person.

In discussing that case it was said:

What persons, then, did Congress intend to pension under said section 2 of the act of June 27, 1890?

The title of the act is:

"An act to grant pensions to soldiers and sailors who are incapacitated for the performance of manual labor, and to provide pensions to widows, minor children, and dependent parents."

The first section provides for the dependent parents; the third section provides for the widows and minor children; the fourth section relates to attorneys' fees and the wrongful withholding of pensions, and if Congress intended to provide for "soldiers and sailors" in the act that intent is found in the second section, as these four sections comprise the act.

The argument of the attorney for claimant indicates that his construction of the words "all persons" in said section was not only soldiers and sailors, but also civilian employees who served in the Army or Navy as such.

The natural interpretation of "all persons" suggested by the title of the act is that the phrase was intended to designate "soldiers and sailors"—not civilians or persons who were not soldiers and sailors.

It is true that the title of an act is but a formal part, and can not be used to extend or restrain any positive provisions in the body of the act, as was announced by Mr. Justice Field, in *Hadden v. Collector* (5 Wall., 112), but if the meaning of the act is doubtful the title, if expressive, may have the effect to resolve the doubts, and is entitled to consideration, as was held in the case of *Dedrick v. Wood* (15 Pa. St., 9), citing the case of *United States v. Fisher* (2 Cranch, 358). See also *Commonwealth v. Marshall* (62 Pa. St., 328).

But, in my opinion, we are not required to invoke the aid of the title of the act in this case, although it must be conceded that the title is clear and expressive, as the context furnishes a stronger and more satisfactory method of ascertaining the intent.

The class of pensioners included in the phrase "all persons" is by the plain language of the same sentence limited to those who served in the military or naval service, * * * and have been honorably discharged therefrom.

Men serve in the military or naval branch of the service by virtue of their enlistment, muster, or commission. No civilian, as such, can legally serve in the Army or Navy. When he enters the service he ceases to be a civilian, he surrenders many of his legal and natural rights as a civilian, and becomes a soldier or a sailor or marine, subject to military and naval rules, laws, and regulations. So also no civilian can be "honorably discharged" from the military or naval service in the sense in which that word is used in the Army, the Navy, and in the pension laws. See cases of George W. Fleck (7 P. D., 343); Margaretha Arendes (8 P. D., 425); Sarah Bush (9 P. D., 114).

It has accordingly been held that a contract surgeon, provost-marshal, enrolling officers, teamsters, and pilots were civilian employees, and not entitled to pension. See cases of Henry Cushman (7 P. D., 408); Annie E. Few (8 P. D., 95); E. S. Leonard (9 P. D., 194); Isaac N. Philips (3 P. D., 377); Andrew J. Shannon (7 P. D., 64); John W. Reynolds (1 P. D., o. s., 223); James M. Barnes (8 P. D., 94); Tryphene (5 P. D., o. s., 291); Samuel P. Tate (1 P. D., 449); Basil T. Ridgway (9 P. D., 300); Henry N. Haynie (9 P. D., 304); Mary Brady (9 P. D., 305); Henry Barlow (9 P. D., 347); Anna M. Whalen (9 P. D., 346), and William B. Taylor (9 P. D., 360).

The argument that civilian employees were granted pension under the act of July 14, 1862, and the resolution of July 16, 1862, and that Congress therefore intended to pension them under the act of June 27, 1890, loses its force when we consider said act and resolution of 1862, as amended by the acts of July 27, 1868, and March 3, 1873 (sec. 4693, Rev. Stat.), provide that no claim of a nonenlisted person, on account of disability from wounds or injury received in battle while temporarily rendering service, should be valid unless prosecuted to a successful issue prior to July 4, 1874, and this was the law at the time Congress enacted the law of June 27, 1890, and is still the law.

It is hardly reasonable to suppose that Congress intended to pension a nonenlisted man under the act of June 27, 1890, while at the same time they refused him pension for wounds received in battle in the war of the rebellion. If they so intended, it is natural to conclude that they would have manifested it by different language than was employed in section 2 of that act. It is true that the words "man," "men," or "enlisted" do not occur in the section, but neither do the words "civilian employee," or "nonenlisted man."

The courts have frequently had occasion to construe the words "all" and "all persons," and limit their application to all of a particular class, intended to be included or excluded, as shown by the context and subject-matter to which they relate, thus ascertaining and carrying into effect the legislative intent.

In the Maine poor law the words "all persons" were limited to those persons who could legally obtain the benefit of the act, and did not include a person who could not legally make a settlement. (See *Hallowell v. Gardiner*, 1 Me., 93; *Milo v. Kilmarnock*, 11 Me., 455.)

So in a statute which provided that "in all cases," etc., the word "all" was limited to a certain class of cases. (See *Philips v. State*, 15 Ga., 518.)

The court in that case, in commenting upon the use of the word "all," used the following language:

"One is amazed in casting a glance over our statute books to find how often this form of expression occurs, frequently signifying, as here, not absolutely 'all,' but 'all' of a particular class only. Indeed, it seems to be common to all writings, lay as well as legal, sacred as well as profane, and the generality of the phrase is frequently to be restrained in an act, not only by the context, but by the general form and scheme of the statute, as demonstrative of the intention of the legislature."

In the case of *Keiffer v. Ehler* (18 Pa. St., 388) the court, by Lowrie, J., said:

"In acts of assembly as well as in common parlance the word 'all' is a general

rather than a universal term, and is to be understood in one sense or the other according to the demands of sound reason, and an act which authorized the attachment of 'all debts' was held not to include debt due by bill of exchange and promissory notes."

In the *ex parte* case of *T. W. Ball* (41 Cal., 29) the court, in construing the phrase "all persons," occurring in the State constitution, which provided that "All persons shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident or the presumption great," held that it did not apply to or include a person who had been convicted of an offense less than capital in degree.

As stated by Sutherland on Statutory Construction, paragraph 279—

"The sense in which general words or any words are intended to be used furnishes the rule of interpretation, and this is to be collected from the context, and a narrower or more extended meaning will be given according as the intention is thus indicated."

In the case of *Reed v. Bush* (5 Bim., 455) the words "all actions" in a stipulation included only actions *ex contractu*, and not torts, as held by the court in construing the words according to their intent.

Assistant Secretary Bussey, in construing the act of June 27, 1890, in his communication to Commissioner Raum, November 22, 1890, named the conditions on which pensions were allowed, and the second condition was, in case of a soldier, that he should have received a final honorable discharge from the service. (See *The Commissioner of Pensions*, 4 P. D., 225.)

The previous instructions issued by the Commissioner under said law clearly show that he construed the words "all persons" as applying to those who were enlisted or commissioned. In the blank form of application the claimant was required to state the date when he was "enrolled" and "honorably discharged."

From the date of the passage of said act of 1890 to the present the words "all persons" in section 2 of said act have uniformly been held to apply to those persons who were enrolled in the service as soldiers, sailors, or marines. (See *Pension Decisions* heretofore cited.)

It is well settled that the contemporaneous and uniform interpretation of the statutes by those charged with that duty is entitled to great weight, and in cases of doubt ought to turn the scale. (See cases of *Brown v. United States*, 113 U. S., 568; *United States v. B. and Mo. Riv. R. R.*, 98 U. S., 334-341; *Douglas v. Pike*, 101 U. S., 677; *United States v. Graham*, 110 U. S., 219-221; *The Laura*, 114 U. S., 441; *Philbrick v. United States*, 120 U. S., 52-59; *United States v. Hill*, 120 U. S., 169; *United States v. Johnston*, 124 U. S., 236; *Robertson v. Downey*, 127 U. S., 607; *Edward Lesser v. Darby*, 12 Wheaton, 207, and *United States v. Gilmore*, 8 Wall., 330.)

As stated by Sutherland on Statutory Construction, paragraphs 307 and 309—

"If there is ambiguity in the language, the understanding of the application of it when the statute first goes into operation, sanctioned by long acquiescence on the part of the legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice. The particular construction given by the Interior Department of the General Government, in reliance upon the uniform opinions of the Attorney-General's Office, of a statute granting lands should be followed by the State authorities until reversed by the Federal courts. * * * The legislature is presumed to be cognizant of such construction, and after long continuance without any legislation evincing its dissent, the courts will consider themselves warranted in adopting that construction. Contemporary construction and official usage for a long period, by the person charged with the administration of the laws, are among the legitimate aids in the interpretation of statutes."

All aids to interpretation of this section of the act of June 27, 1890, lead naturally and forcibly to the conclusion that the words "all persons" used in the first line of the section were not intended to include any person who was not regularly in the military or naval service of the United States, and a civilian employee or non-enlisted person is therefore excluded from the benefit of the act.

It might further be stated that the language of section 3 of said act of June 27, 1890, uses the words "officer or enlisted man" in providing pension for widows. The language is as follows:

That if any officer or enlisted man who served more than ninety days in the Army or Navy of the United States during the war of the rebellion and who was honorably discharged has died, or shall hereafter die, leaving a widow—

and the section then proceeds to name the conditions under which the widows or children shall be entitled to pension, and closes with the provision that the widow shall have married said soldier prior to the passage of this act.

If Congress intended to include in section 2 of said act civilian employees who served with the Army or Navy, why should they have excluded, in section 3 of said act, his widow and children from the like benefit that was conferred by section 4702, Revised Statutes, upon the widows and children of acting assistant or contract surgeons and other nonenlisted men enumerated in section 4693, Revised Statutes?

It should be observed that even under the provisions of section 4693, Revised Statutes, acting assistant or contract surgeons were not placed upon an equal pensionable footing with the officer or enlisted men, but their rights to pension are limited to those who incurred their wound, injury, or disease while actually performing their duties as surgeons with the military forces in the field, or in transitu, or in hospital.

This is the only law that provides in terms for pensioning acting assistant or contract surgeons.

The records of the War Department show that claimant ~~contracted~~ as acting assistant surgeon April 24, 1864, and that his ~~contract~~ was terminated July 6, 1865, and this record is ~~not disputed~~ by the claimant, but it is urged that in view of the ~~specially~~ dangerous services performed by Dr. Bowles ~~at the front~~, he is unquestionably entitled to a pension under ~~the act of June 27, 1890~~.

~~The character of the service or the places where it was performed does not~~ change the fact that he was not an officer or an enlisted man, but was a civilian employee.

In accordance with the numerous decisions of this Department heretofore cited, and with what I believe to be a correct construction of the act of June 27, 1890, he is not included in said act and has no title to pension thereunder.

The former departmental decision in this case is therefore reaffirmed and the motion is overruled.

SERVICE—ACT JANUARY 29, 1887—MEXICAN WAR.

LANY BOUDAY (WIDOW).

A soldier who enlisted in the Regular Army April 7, 1848, and assigned to a battery which left Fort Columbus, N. Y., for Vera Cruz, Mexico, May 11, 1848, where he arrived May 31, 1848, one day after the termination of the war, and was ordered from Vera Cruz to New Orleans June 4, 1848, where he arrived June 17, 1848, and thence to Governors Island, N. Y., July 15, 1848, did not actually serve sixty days in Mexico, or on the coast or frontier thereof, or en route thereto, and his widow is not entitled to a pension under the act of January 29, 1887.

Case distinguished from that of Elizabeth Young (9 P. D., 44).

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
March 11, 1899.*

On September 10, 1898, a motion was filed on behalf of Lany, widow of Ambrose Bouday, late private Company G, Second United States Artillery (Mexican war), for reconsideration of departmental decision of October 20, 1894, wherein the Department affirmed the Bureau action of January 16, 1894, rejecting her widow's claim (No. 11664), filed October 18, 1893, under the act of January 29, 1887, on the ground that soldier did not serve sixty days in Mexico, or on the coast or frontier thereof, or en route thereto.

It is contended, in brief, that soldier's service in the war with Mexico, under the departmental decision in the case of Elizabeth Young (9 P. D., 44), should date from his enlistment.

The records of the War Department show that Ambrose Bouday enlisted April 7, 1848, at Albany, N. Y., to serve five years, and was assigned to Battery G, Second Regiment United States Artillery. The battery left Fort Columbus, N. Y., for Vera Cruz, Mexico, May 11, 1848; arrived there May 31, 1848; left Vera Cruz for New Orleans, La., June 4, 1848, and arrived there June 17, 1848; left New Orleans, and arrived at Governors Island, N. Y., July 15, 1848.

He was honorably discharged April 6, 1853, at Fort Monroe, Va., by reason of the expiration of his term of service.

~~Soldier was married to Elizabeth December 29, 1853, and died September 6, 1883. He was pensioned under the act of January 29, 1887, by Bureau action of June 28, 1887.~~

As stated in the departmental decision of October 20, 1894—

Although appellant's husband was improperly pensioned under said act, such inadvertence does not in any manner strengthen his widow's right to pension, nor bring her within the requirements of the act of January 29, 1887.

In the case of Elizabeth Young (9 P. D., 44) it was stated that the "soldier's enlistment was in a volunteer service for the war with Mexico, and not in the Regular Army." In the case of David M. Geiger (9 P. D., 28), as in the Young case, the companies in which the soldiers enlisted served in Mexico, in the war with that country, and their point of destination at date of their enlistments was Mexico, and

it was held that in such cases the period of time included in the term "en route thereto" in the act of January 29, 1887, commenced at the date of the soldier's enlistment, when his service in the war with Mexico conformed in other respects to the requirements of the terms of said act, and where the soldier is not responsible for or chargeable with delay in finally reaching Mexico, the coasts or frontier thereof, citing the case of Euroda H., widow of Matthew M. Lyon (7 P. D., 215), where the soldier was delayed by sickness at New Orleans, La., but being en route he was held to come within the act, and his widow was pensioned. Lyon was a volunteer in the Fourth Kentucky, and was en route with his company when taken sick.

Those cases are clearly distinguished from the case under consideration. In all those cases the soldiers were volunteers who enlisted for service in the war with Mexico.

In this case the soldier's enlistment was in the Regular Army for a term of five years. The organization to which he was assigned was not ordered to Mexico, or, at least, was not en route until May 11, 1848, and was ordered from Vera Cruz, Mexico, to New Orleans, June 4, 1848, at which date he was in legal effect discharged from Mexican war service. The ending of the Mexican war operated as an honorable discharge from the particular service of those of the Regular Army or Navy who were engaged in that war, so as to entitle such persons to a pension under the act of January 29, 1887, if otherwise they came within the provisions of said act. See cases of *United States v. North* (112 U. S., 510); *William B. Johns* (2 P. D., 293); *Helen M. Leslie* (6 P. D., 255); *Eveline S. Tallman* (6 P. D., 261); *Nathan Totten* (7 P. D., 33), and *William Ross* (8 P. D., 407).

The Mexican war commenced April 24, 1846 (see communication, 1 L. B., 165; *Thomas Daly*, 2 P. D., 220, and *Theresa Bonnavau*, 8 P. D., 507) and terminated May 30, 1848 (see *Instructions*, 7 P. D., 240, and *Helen M. Geiger*, 8 P. D., 28). As stated in the case last cited, it is not to be presumed, however, that after that date, May 30, 1848, no service was rendered in said war, though it will be presumed that all belligerent forces were withdrawn from Mexico and returned from the war within a reasonable time thereafter.

Soldier did not start for the Mexican war until May 11, 1848, and was withdrawn from Mexico June 4, 1848, so that his service "in Mexico, or on the coast or frontier thereof, or en route thereto," in the war with that nation would, under the decision in the case of the *United States v. North* (112 U. S., 510), be limited to twenty-four days.

Even dating soldier's service from date of enlistment, April 7, 1848, there would be but one month and twenty-seven days' service up to the time he was ordered away from Mexico with his command, June 4, 1848, at which date he was honorably discharged from his Mexican war service under the Supreme Court decision. But his term of service in the United States Army did not expire until April 7, 1853, and there

is no reason or authority for computing the time from the date of his enlistment, or the time that elapsed from the date he left Vera Cruz, Mexico, until he returned with his command to New York, for the purpose of making up the sixty days' service required by said act. Being in the Regular Army, his home was wherever he was ordered, up to the date of his final discharge from his five-years' term of enlistment. In this respect the service of those in the Regular Army or Navy differs from that of the volunteer, who enlists only for the war, and who upon the expiration of his service is entitled to be returned to his place of enlistment.

This case, therefore, is clearly to be distinguished from the case of Elizabeth Young (9 P. D., 44), and it is evident the soldier did not serve the sixty days required by the act of January 29, 1887, "in Mexico, or on the coast or frontier thereof, or en route thereto." He is not shown to have engaged in any battle in said war.

His widow is therefore not entitled to a pension under said act of January 29, 1887, and the motion is accordingly overruled.

DESERTION-DISCHARGE.

DE WITT C. NASH.

As claimant deserted and was never discharged from his second service during the war of the rebellion, he has no pensionable status under the act of June 27, 1890, but is pensionable under the general law as to disabilities received in his first service, from which he was discharged, his claim being filed subsequent to July 1, 1880.

Assistant Secretary Webster Davis to the Commissioner of Pensions, January 30, 1899.

On April 13, 1896, this appellant, De Witt C. Nash, who was a member during the war of the rebellion of Company G, Fourteenth Ohio Infantry; of Company D, Fifty-fourth Ohio Infantry; of Battery B, Second United States Artillery, and of Battery K, First United States Artillery, filed a claim, No. 1176327, for pension under the general law, and also a claim for pension under the act of June 27, 1890, both of which were rejected in April, 1897, on the ground of his desertion from Company D, Fifty-fourth Ohio Infantry, from which service he was never discharged.

From these rejections he appeals, December 4, 1897, contending both are erroneous because he had, he states, a final honorable discharge from his last service.

The records of the War Department show he enlisted in the first-mentioned service April 22, 1861, and was mustered out with the company August 13, 1861.

He then enlisted in said Company D on September 10, 1861, deserted therefrom August 13, 1862, and five days later reenlisted in said Battery B, in violation of the twenty-second (now fiftieth) article of war.

On September 9, 1864, he again deserted, for which desertion he was apprehended on the 24th of the following month, was tried for desertion, found guilty, and sentenced; and on August 17, 1865, was transferred to said Battery K, from which he was discharged October 7, 1865, by reason of expiration of service, having made good time lost by desertion.

It does not appear that he was ever discharged from his second service, that in Company D, Fifty-fourth Ohio Infantry; and the charge of desertion from that organization still stands against him. He has not, therefore, an honorable discharge from all service contracted by him to be performed during the war of the rebellion, and is not, consequently, under the settled rulings of the Department, pensionable under the act of June 27, 1890, even if his final discharge, October 7, 1865, be considered honorable, which is questionable in view of the fact that it was from a service required of him to make good time lost by his second desertion. Your rejection of the claim under the act of June 27, 1890, was therefore clearly correct and is affirmed.

As to the claim under the general law, it is noted that part of his disabilities alleged therein—viz, results of measles—are alleged to have originated in his first service, from which he was honorably discharged August 13, 1861, the other alleged disabilities being alleged to have originated while he was in his second service, from which he deserted and was never discharged.

Under my decision in the case of John Norton (9 P. D., 382) the claim as to the disabilities alleged to have originated in said second service must be rejected on the ground that he was never discharged from that service and had by deserting therefrom repudiated his contract of enlistment for that service, forfeiting any right to any benefit incident to such enlistment.

The claim as to the disabilities alleged to have originated during the first service, however, from which he was discharged, stands upon a different basis. As held also in said John Norton case, claimant's subsequent desertion is no bar to pension on account of these disabilities, and he may therefore be pensioned on account thereof, notwithstanding such desertion, from the date of filing his claim.

In this case original pension must commence, under the express provisions of said act of March 3, 1879, from date of filing the claim, it being filed subsequent to July 1, 1880; and as desertion in itself is not a bar to pension, no reason exists why pension should not commence from the date of filing the claim, notwithstanding the desertion from the second service, and that there is no discharge from that service.

In the present case there was a final discharge from the service, which placed this claimant again in the pensionable status which he had lost on his reenlistment, and he might have thereafter, at any time, claimed and been allowed pension accordingly, pension commencing, if claim were filed prior to July 1, 1880, from date of his first discharge (if on account of disability incurred in that service), and then

withdrawn until his final discharge, when it would recommence and continue, or if claim were filed subsequent to July 1, 1880, such pension would commence from date of filing the claim under the express provisions of said act of March 3, 1879.

The desertion of August 18, 1862, from the second service could not affect the status or rights under any such claim, for, as is demonstrated in the Norton case cited, desertion is not in itself any bar to pension, being an offense only during the term of the enlistment from which the desertion was made. Attorney-General Taft held (15 Op., 157) that desertion is a continuing offense "up to the end of the term of engagement, but not beyond."

When this claimant, therefore, received his final discharge (from his third service), he was no longer in desertion from his second service, the term of that enlistment having presumably terminated, enlistments at that time generally being for three years. And while he could not have any pensionable status on account of his second service, there being no discharge from that service, and he having by deserting therefrom repudiated that contract of enlistment, thereby becoming equitably estopped from receiving any benefits thereunder, as held in said Norton case, yet his final discharge restored him to a pensionable status on account of the service or services from which he had been discharged.

Your action is therefore reversed as to alleged measles and results thereof, and you will please readjudicate that part of the claim in accordance with the foregoing.

ATTORNEYSHIP—ASSIGNMENT—SUBSTITUTION.

JOHN W. SHORT (CLAIMANT).

JAMES T. KNOWLAND & SON (ATTORNEYS).

"The written consent of a claimant is declared essential to a valid assignment of an attorneyship or agency from one attorney or agent to another * * *." (Rule 2, Rules of Practice before the Commissioner of Pensions.)

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
March 11, 1899.*

James T. Knowland & Son, of Anderson, Ind., April 29, 1898, entered an appeal from the action of the Bureau in the matter of recognition in the claim for pension under the general law of John W. Short, Company C, One hundred and thirtieth Illinois Volunteer Infantry.

Newson & Knowland, February 13, 1889, filed the soldier's original claim under the general law, and subsequently filed some evidence. On February 26, 1896, they made a general transfer of all their claims to James T. Knowland & Son, the appellants. No written consent of the soldier is filed to the transfer of the attorneyship in his claim.

W. W. Dudley & Co., of Washington, D. C., September 5, 1896, filed a power of attorney. They were notified September 24, 1898, of the rejection of the case.

Rule 2 of the Rules of Practice before the Commissioner of Pensions provides that—

The written consent of a claimant is declared essential to a valid assignment of an attorneyship or agency from one attorney or agent to another * * *.

In the case of Alexander Robbins (7 P. D., 80) the Department held that—

As claimant's consent to the assignment was not obtained as required by rule 2, Rules of Practice before the Commissioner of Pensions, said assignment is invalid.

So in this case, under the case and rule cited, appellants are without authority to appear in the claim; therefore the action of the Bureau in denying them recognition was proper, and your action is affirmed.

FEE—ATTORNEYSHIP—MATERIAL SERVICE.

JOSEPH DRONANT, DECEASED (CLAIMANT).

W. W. DUDLEY (ATTORNEY).

Material evidence filed by an attorney entitled to recognition, at any time before the admission of the claim, though it does not reach the case until after the same is allowed, is such service as may warrant the payment of a fee.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
March 24, 1899.*

W. W. Dudley & Co., of Washington, D. C., October 28, 1898, appealed from the action of the Bureau in the matter of fee on the issue of April 5, 1897, in the claim for pension under the act of June 27, 1890, of James Dronant, deceased, Company H, Ninth Connecticut Volunteer Infantry (the widow completing).

The appellant, September 5, 1890, filed the soldier's original declaration for pension under the act of June 27, 1890, which contained a power of attorney in his favor. He filed evidence March 10 and May 20, 1891, and June 21 and September 9, 1892. The claim was rejected March 5, 1894, upon the ground that the soldier was dead, and there was no person entitled to pension under existing law. Appellant was so advised March 27, 1894.

On August 3, 1894, Josiah Gross, of New Orleans, La., filed a power of attorney, together with an application of the widow, to complete the claim. November 2, 1894, he filed material evidence, and on April 10, 1896, was disbarred.

On January 17, 1896, appellant was called upon for material service; in response thereto he filed evidence March 2, 1897, which complied with the call, and on the same date filed a new power of attorney.

However, this evidence and the power of attorney was not with the claim when it was adjudicated.

The appellant was denied a fee upon the ground that he was without proper authority to appear in the claim. Since said action the power of attorney has been found, hence the ground assigned is no longer tenable. Although the evidence filed March 2, 1897, was not with the case when considered, it is a well-known rule of practice that the materiality of evidence relative to service is not dependent upon the fact whether said evidence is absolutely necessary to prove the case; if it be deemed necessary, and it is called for, an attorney who files it before the claim is allowed renders material service. The further question arises whether these conditions would clothe the appellant with a right to fee, in view of the fact that he had no rights in the case when the call was made.

This question arose in the case of Daniel B. Ford (9 P. D., 137), in connection with the rule there laid down, which reads as follows:

The filing of a declaration in response to a call therefor by the Bureau, if filed at a time when deemed necessary and material, though subsequently deemed immaterial, is such service as may entitle an attorney to a fee.

As to an exception to the rule, the Department said (9 P. D., 138):

The only ground upon which this case might be distinguished is that the call was made at a time when the appellant was not the attorney of record, and, therefore, the call was not a recognition of his attorneyship or of any services or efforts upon his part. I would be inclined to deny the appellant a fee upon this ground, and thus create an exception to the rule were it not a fact appearing from the record that the Bureau did not deem the filing of a new declaration unnecessary until after said new declaration was filed; so the inference would be that the filing of the same was deemed necessary when it was filed. Therefore, it would be an after consideration that would operate to defeat the appellant's title to a fee; that is, the opinion of to-day would overrule the opinion of yesterday. I do not approve of the idea of basing title to fee upon such contingencies.

Although in this case the appellant was in default at the time when the call was made, the fact that it was made upon him was a recognition of his prior attorneyship. As during that period he had rendered material service, and when called upon for further service secured authority to further prosecute the case and render the services called for, I am of the opinion his attorneyship should be recognized. Furthermore, although the evidence was not with the case when the claim was legally approved for admission March 16, 1897, it had then been on file in the Bureau since March 2, 1897. Now, if the fact alone that the evidence was not with the case when adjudicated, though filed fourteen days prior to action, would serve to form an exception to the rule, then if evidence were filed within a week from the call therefor but never reached the case prior to adjudication, the filing thereof would not profit the attorney. As the fault would be the Bureau's, though unavoidable, an attorney should not suffer any forfeiture of rights, if within the power of the Bureau to do equity. Therefore, in this case,

it is held that the filing of said evidence was material service and inured to the benefit of the appellant.

So, as the appellant came regularly into the case, rendered material service, and was not in default when the claim was allowed, he is entitled to the fee. Action reversed.

FEE—CONSOLIDATION OF CLAIMS.

DAH YA NE AH KEE LA NEE GAR (CLAIMANT).

JOHN L. SPRINGSTON (ATTORNEY).

The several applications for pension (to which a widow may be entitled in her own right) in behalf of the widow and minor children of a soldier on account of his services and death constitute but a single claim for pension, and when the several applications are made through the same attorney but one fee can be paid to him.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
March 28, 1899.*

John L. Springston, of Sallisaw, Ind. T., May 21, 1898, appealed from the action of the Bureau in the matter of fee on the issue of May 7, 1898, in the claim for pension under the general law of Dah ya ne Ah Kee la nee gar or Si cah wee, now Water-down, as widow of Ah Kee lah nee gar, alias Israel Si cah wee, Company I, Third Indian Home Guards Volunteer Infantry, United States Army.

John W. Wright, of Washington, D. C., December 12, 1866, filed the claimant's original declaration for a widow's pension under the general law. The appellant, July 9, 1891, filed a new declaration for pension under said law and became entitled to recognition under a power of attorney therein contained. The claim was allowed December 4, 1896, at the rate of \$8 per month, from May 21, 1863, the date of the soldier's death, to June 1, 1868, the date of the claimant's remarriage, and a fee of \$25 was certified to the appellant. On this issue no pension was allowed on account of the child, Nellie, as the date of her birth was not determined.

On June 1, 1896, the appellant filed another declaration in behalf of the claimant for pension under the general law. On May 7, 1898, certificate issued to allow the rate of \$2 per month to said claimant on account of the child, Nellie, from July 25, 1866, date of act, to June 1, 1868, date of remarriage of the claimant. On this issue no fee was certified to the appellant, although there was on file at the date of said issue fee agreements for \$25 in his favor.

By his original contract with the claimant the appellant was obligated to secure for her all pension due her as widow of the soldier. On the issue of December 4, 1896, the appellant was certified the full contract fee of \$25, the largest fee to which he is entitled under the

law. Therefore he was not entitled to another fee on the supplemental issue of May 7, 1898, to allow increase to the widow at \$2 per month on account of the minor child. The fact that there were two issues in the claim is of little importance. There may have been more than two issues without any advantage accruing to the appellant.

Under the decisions of this Department the appellant is entitled to one fee in this claim. The rule applicable may be stated as follows:

The several applications for pension (to which a widow may be entitled in her own right) in behalf of the widow and minor children of a soldier, on account of his services and death, constitute but a single claim for pension, and when the several applications are made through the same attorney but one fee can be paid to him.

The principles underlying the foregoing rule have been observed and laid down in the following cases: Robert C. Banker (8 P. D., 302); Minors of Louis Ollendorf (8 P. D., 272); Sarah Clark (7 P. D., 47); Hattie G. Dyer (7 P. D., 160); Elizabeth M. Williams (9 P. D., 117); Elisha Harris, certificate No. 293377 (29 Fee P. L. Bk., 406), decided August 18, 1897.

As it appears that appellant has received the full contract fee on the issue of December 4, 1896, in this claim, he is not entitled to another on the issue of May 7, 1898.

Action affirmed.

FEE-FEE AGREEMENTS—CASE OF DIFFICULTY AND TROUBLE.

NORMAN DAVIS (CLAIMANT).

C. E. FOOTE (ATTORNEY).

Proceedings were instituted by the Government which resulted in action by the Bureau in withholding pension to reimburse the Government. Upon appeal, action was reversed and certificate issued to allow payment of pension withheld; on said issue no fee was paid. Fee agreements for \$25 were filed.

Held: As the Commissioner of Pensions has not ordered that fee agreements be recognized in proceedings like those described, the fee agreements filed applicable to such proceedings in this particular claim should not be recognized. Also, that in the absence of authority to recognize fee agreements in such proceedings in claims, such fee shall be certified as the Commissioner may see fit to allow not exceeding \$25 in claims under the general law. Case of George D. Hilton (8 P. D., 182), in so far as it conflicts herewith, is overruled.

Assistant Secretary Webster Davis to the Commissioner of Pensions, April 10, 1899.

C. E. Foote of Kalamazoo, Mich., February 26, 1898, entered an appeal from the action of the Bureau in the matter of fee on the issue of November 25, 1896, in the claim for pension under the general law, of Norman Davis, Company I, Nineteenth Michigan Volunteer Infantry.

The soldier was originally pensioned at the rate of \$12 per month for disease of eyes. On December 3, 1888, a certificate issued allowing

the rate of \$17 per month for disability due to disease of eyes and ventral hernia. On August 30, 1893, upon information obtained by special examination, pension on account of ventral hernia was made to terminate, and the rate was reduced to \$12 for disease of eyes. On this issue the pension agent at Detroit, Mich., was directed to withhold pension until the Government was reimbursed the amount paid on account of ventral hernia.

On July 18, 1896, appellant, in behalf of the soldier, entered an appeal from the action of the Bureau in withholding pension, and on October 10, 1896, the action of the Bureau was reversed. November 25, 1896, certificate issued to allow pension withheld. No fee was paid.

The appellant filed July 11, 1896, fee agreements for \$25. He contends that the stipulated fee should be paid him.

Action of rejection is based (pursuant to advisement by the Department, in communication herein, dated March 20, 1897), upon the principles enunciated for the first time in the case of George D. Hilton (8 P. D., 182). Leading up to the rule there laid down it was argued that except for securing the original allowance of pension no fee can be paid unless fee agreements have been filed and are approved by the Commissioner of Pensions. The following language is used (see page 186).

The language employed (section 4 of the act of July 4, 1884) seems to clearly describe an original claim for pension, and since upon the adjudication of an original claim for pension, a fee of \$10 (unless more be allowed under a recognized fee agreement) is then and there paid, and the statute limits the payment (in the case described in the act) to \$10 and no more, it follows that the Commissioner is disabled from directing any further payment in such case unless his warrant for so doing is contained within the terms of the act relative to fee agreements made use of in the prosecution of a case.

So in this case as on the original issue to allow pension a fee was paid, and the fee agreements filed were not approved, no fee whatever was certified in conformity with the more particular and specific instructions by the Department contained in communication dated April 1, 1897.

Presumably the principles underlying the reasoning and the rules laid down in the Hilton decision are contained in that portion thereof which reads—

The relation of attorney and client is one of natural right as at the common law, subject only perhaps to the conditions of public policy. No statute relating thereto which is in derogation of the common-law right should or can be expanded so as to vary or defeat the legislative intent. (Page 185.)

However this may be, the law plainly directs that a fee shall be paid to an attorney for his services in securing the original or any subsequent allowance for pension; that in certain classes of claims fee agreements, when filed, shall be recognized, and, in certain cases, fee agreements may be recognized if the Commissioner of Pensions sees fit to recognize them.

Now in this case the question arises, inasmuch as the claim is one in which the recognition of the fee agreements is within the discretion of the Commissioner of Pensions, whether any fee can be certified to the appellant.

The act of July 4, 1884, contains the following direction:

In all cases where application for pension is made * * * and no agreement is filed with the Commissioner of Pensions, as herein provided, the fee shall be \$10 and no more.

These proceedings do not constitute an application for pension. They were commenced by the Government; therefore it would be a stretch of imagination even to term these proceedings "an application for pension." So that portion of the act cited has no application. There is another provision contained in section 4768, Revised Statutes, relative to the payment of a fee of \$10 when no fee agreements are filed. Said section reads:

The Commissioner of Pensions shall forward the certificate of pension granted in any case to the agent for paying pensions when such certificate is made payable, and at the same time forward therewith one of the articles of agreement filed in the case and approved by the Commissioner setting forth the fee agreed upon between the claimant and the attorney or agent, and where no agreement is on file as hereinbefore provided he shall direct that a fee of \$10 only be paid the agent or attorney.

In a recent decision by this Department in the case of George Aab, deceased (32 Fee P. L. Bk., 292), upon motion for reconsideration entered by the Bureau of Pensions, attention was called to the fact that the foregoing provisions were first enacted when the filing of fee agreements were authorized in all cases, and that therefore the words "hereinbefore provided" related to all claims for pension. That—

By section 4 of said act, section 4786, Revised Statutes, was amended so as to authorize the filing of fee agreements only in particular cases; when said section was thus amended and limited in its scope, the words "hereinbefore provided," as used in sections 4768 and 4786, and in the act of July 4, 1884, reenacting and amending said sections (4768 and 4786), were limited accordingly in their scope; they could have none wider than their antecedent clauses. Therefore, the provision of said section 4786, Revised Statutes, viz, "when no agreement is on file as hereinbefore provided, he shall direct that a fee of \$10 only shall be paid the agent or attorney," justifies the supposition that the filing of fee agreements in all those very cases thus referred to was permissible, and the history of the legislation in this particular warrants the assertion: That in no other claims was the Commissioner of Pensions directed by said section 4768, Revised Statutes, as reenacted, to pay a fee of \$10 than in those cases in which (hereinbefore) it was provided that fee agreements may be filed.

Section 4 of the act of July 4, 1884, provides that fee agreements are authorized and shall be recognized—

in * * * and in such other cases of difficulty and trouble as the Commissioner of Pensions may see fit to recognize them.

It may properly be considered that the work to be performed in the classes of cases specified in said section, and in which the law directs the recognition of fee agreements when filed, affords a basis for an esti-

mate of the work necessarily entailed in the prosecution of other classes of claims so as to warrant the Commissioner of Pensions in seeing fit to direct that fee agreements should be recognized therein. I am not informed that the Commissioner of Pensions has issued any order or otherwise directed that fee agreements should be recognized in proceedings like the one under consideration. If he has done so, then had this appellant filed fee agreements, the fee stipulated therein should be certified the same as in any other class of claims in which the filing of fee agreements are authorized and their recognition directed by law.

But inasmuch as the Commissioner of Pensions has not ordered that fee agreements be recognized in proceedings like those under consideration (which with like proceedings in other claims constitute a class, and thus can properly be described in an order), the filing of fee agreements is not authorized and should not be recognized if filed.

So, as these proceedings do not constitute an application for pension and the filing of fee agreements is not authorized, such fee should be certified as the Commissioner may see fit to allow, not exceeding \$25, as the proceedings are under the general law. This for the same reasons as are assigned in the case of George Aab, deceased (*supra*), for the payment of like fees in claims for accrued pension.

Therefore, the case of George D. Hilton (8 P. D., 182), so far as it conflicts with the opinion here expressed, is overruled. For the foregoing reasons the action of the Bureau is reversed. Such fee should be certified to the appellant as the Commissioner of Pensions may see fit to allow, not exceeding \$25.

FEE—REFUNDMENT—FRAUD—REIMBURSEMENT.

MILTON W. BAILEY (CLAIMANT).

MILO B. STEVENS & CO. (ATTORNEYS).

Where a pension under the act of June 27, 1890, is withheld for the purpose of reimbursing the United States for money paid to a claimant in a fraudulent claim under the general law, payment of fee need not be made until the United States has been reimbursed in full, but if payment of fee is made prior thereto the attorney can not be compelled to refund, if otherwise entitled.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
April 10, 1899.*

Milo B. Stevens & Co., of Washington, D. C., September 8, 1898, entered an appeal from the action of the Bureau in the matter of fee on the issue of September 23, 1897, in the claim for pension under the act of June 27, 1890, of Milton W. Bailey. The record shows that the above-named soldier was, on February 13, 1866, allowed a pension of \$4 per month from May 14, 1865, for compound fracture of left leg, which rate was increased to \$8 per month from January 19, 1887, based

on his service as a private in Company I, One hundred and sixtieth New York Volunteer Infantry. This pension was terminated on January 4, 1896, and soldier's name was dropped from the rolls on the ground that his pensioned disability was not due to his military service, as required to give title under the general law, but existed prior to his enlistment, as shown by reports from the War Department, including certificate of disability for discharge from his first service in Company D, Ninth New York Volunteer Cavalry. It appears that on April 4, 1892, appellants filed in the above-named soldier's behalf a claim for pension under the act of June 27, 1890, which claim was based on service in Company D, Ninth New York Volunteer Cavalry, referred to above. This claim was allowed on September 23, 1897, at \$10 per month from April 4, 1892. Provision was made for deduction of all payments made under the general law. A fee of \$10 was certified appellants. This fee was not payable until the Government had been reimbursed for erroneous payments under the general law, on the ground that there was no existing fund from which to pay it, and because attorney's fees are payable out of the first money paid to the soldier, and no pension was payable to him until reimbursement was had as aforesaid.

Through an error of the late United States pension agent at Des Moines, Iowa, by whom the pension was payable, the attorney's fee was paid to appellants, and also the balance of the amount due as first payment was made to the soldier, notwithstanding the fact that recovery of illegal payments under the general law had not been made. Upon discovering that the pension agent had paid the fee of \$10 to the appellants, they were called upon by the Bureau to refund the said amount. They refunded, and then filed this appeal from the action of the Bureau in demanding refundment.

It is argued in the report of the Bureau that—

Although there might be some question as to whether appellants should have been called upon to refund the fee referred to, yet inasmuch as they have refunded, it is believed that the Bureau has authority to turn said fee into the United States Treasury or, at least, say what disposition shall be made of it.

In the case of Elizabeth Striggon (8 P. D., 12) the Department held that—

Attorney's title to fee is dependent on his client's title to pension, and where the pension was fraudulently obtained, the Commissioner of Pensions may require the refundment of the fee paid to the attorney who prosecuted the claim as well as the pension so paid the claimant.

Also, in the case of Samuel W. Keyes (7 P. D., 78), it was held as follows:

Where a pension under the act of June 27, 1890, is withheld for the purpose of reimbursing the United States for money advanced claimant under an allowance of pension unwarranted under the general law, the attorney in the new law claim is entitled to a fee, but the same may not be paid until the United States has been reimbursed in full.

The purpose for withholding the payment of pension to the claimant is for recoupment by the Government of money paid to him to which he has no title. The process implies that the claimant has title to the money withheld, and which is to be applied in discharge of his obligation to the Government. Such proceedings may properly be termed recovery without action at law. However, if the Government does not apply the money to the debt, but pays the money to the claimant, a question arises whether a right of action can be based upon the fact that payment was thus made. But it is certain that the right of action for money paid to the claimant to which he has no title, in his pension claim under the general law, the allowance of which was procured through his fraud, still lies. With that claim the appellants had no connection. They are required to refund a fee certified to them in the claim under the act of June 27, 1890, and to pension in that claim it is admitted the claimant is entitled, otherwise the Government would not seek to apply money due therein to the extinguishment of the amount paid in the fraudulent claim. So the rule laid down in the Striggon case (*supra*) has no application. Nor has the rule in the case of Keyes (*supra*) any application. There it is said that the fee may not be paid until the Government is reimbursed. In this case payment has been made. It is true that payment should not have been made; but payment is not invalid nor contrary to law. The fact that payment was made distinguishes the case.

The right of recoupment rests against the claimant, not against his creditors, and among them stand the appellants. The Government, acting as the agent of the claimant, under authority evidenced by an instrument executed in accordance with a formula the observance of which, it is well known, is strictly enforced in every instance, paid the appellants a fee of \$10. This fee had been earned. Now, presuming that recovery in an action at law from the claimant lies on the part of the Government, based on the payment of pension in the valid claim, it does not follow that said action lies against his creditors to whom he may have paid the money which he received from the pension agent; and, as said before, the appellants are his creditors. These appellants have been paid in a legal manner a fee which they earned, and this without solicitation or fraud upon their part. The conclusion is irresistible that they are entitled to the fee which has been paid them.

It is contended that the refundment by the appellants of the fee paid them upon the demand of the Bureau is their voluntary act. This view can not be accepted. The rules of practice require that an attorney shall refund in a case where a fee has been paid him, upon demand of the Bureau, before his appeal from the action of the Bureau denying him a fee will be entertained. Therefore, such disposal of the fee as is suggested in the report of the Bureau can not be made; the fee should be returned to the appellants, unaccompanied by any directions as to its disposal. Therefore the action of the Bureau in requiring appellants to refund the fee which has been paid them is not approved.

MARRIAGE—ADULTEROUS COHABITATION.

ELIZA A. DANIELS (MOTHER).

The evidence shows that the soldier left surviving him a widow and minor children. His mother, therefore, has no pensionable status, notwithstanding the fact that the widow was denied a pension on the ground of her adulterous cohabitation.

Assistant Secretary Webster Davis to the Commissioner of Pensions, April 10, 1899.

This appellant, Eliza A. Daniels, on January 2, 1892, filed a claim (No. 537191) for pension as the mother of John S. Daniel, deceased, who was a member, during the war of the rebellion, of the Fourteenth Independent Battery, Michigan Light Artillery.

Said claim was rejected April 29, 1897, on the ground that said soldier left a widow and minor children; and the claimant appealed January 8, 1898, contending he was never legally married to the alleged widow and mother of said children.

This soldier died September 24, 1881, leaving a pension claim pending, which was completed by Kittie M. Daniels as his widow, and the accrued pension due thereunder was paid her accordingly.

She also, on June 6, 1883, filed a claim for widow's pension, and was allowed same, receiving it to June 4, 1891, when payment was suspended and her name was dropped from the rolls on the ground that she was not the soldier's legal widow.

Subsequently, the claim by the soldier's mother being submitted for special examination, an elaborate opinion was rendered by the chief of the law division of your Bureau, in which it was held that said Kittie M. Daniels was the legal widow of the soldier. A new brief face was prepared accordingly, with a view to her restoration to pension as his widow, but restoration was refused on the ground of her open and notorious adulterous cohabitation since August 7, 1882, with one George F. Anderson.

The only question in this case is whether the soldier left a widow, as the mother can have no pensionable status if there were a widow. This question is discussed so fully in said opinion by the chief of the law division that that opinion may well be embodied herein. It is as follows:

The soldier enlisted December 30, 1863, and was discharged July 1, 1865. He was subsequently pensioned for disability incurred in the service, and died September 24, 1881.

Kittie M. Daniels filed declaration as widow June 6, 1883, alleging marriage to the soldier August 8, 1862, at Mosherville, Hillsdale County, Mich., by 'Squire Elisha Thornton, now dead. She was pensioned September 10, 1890, with allowance for four minor children. On June 4, 1891, payment was ordered suspended, and her name was dropped from the roll on the ground that she was not the legal widow of the soldier.

This action was founded upon the affidavit of Eliza A. Daniels, mother of the soldier, who claimed that her son had not been married to the pensioner, but that pen-

sioner had been married to one James B. Finley. The said Eliza A. is an applicant for pension as dependent mother. An investigation showed the fact of this marriage to Finley, and failed to show direct proof of pensioner's prior alleged marriage to the soldier. Further investigation was had on application of the widow for restoration. There are in all several reports of special examiners, and the available sources of information appear to have been exhausted, except that a circumstance repeatedly alleged by the pensioner, and which might have some confirmatory bearing on the fact of her ceremonial marriage to the soldier in 1862, does not seem to have been inquired into.

Pensioner states, and the mother admits, that she was at first accepted by the soldier's family as the wife of their son, but she says that they afterwards claimed that her marriage was illegal because 'Squire Thornton had no authority to perform a marriage in another township, and that they applied for the town bounty which, after investigation by the town authorities, was paid to her upon the statement made to them by 'Squire Thornton himself that he did perform the marriage ceremony between the soldier and the said Kittie M. Daniels.

The objections to the legality of pensioner's marriage to the soldier on ground of want of jurisdiction of the magistrate and on ground of want of record evidence of the marriage are neither of them tenable. A marriage in Michigan is not invalid though performed by a magistrate from another town, neither is the absence of an official record material if the fact is otherwise sufficiently proved.

The pensioner has failed to prove this alleged marriage otherwise than by cohabitation and repute. She filed a purported marriage certificate which has not been regarded as genuine, and which bears unmistakable marks of having been tampered with. This certificate has been properly rejected as inadmissible. She also filed the affidavits of George F. Anderson and Benjamin E. Deyo, who say they were present and witnessed the marriage. These witnesses also testified before the special examiners. Anderson's testimony is contradictory. In his first affidavit, dated December 4, 1886, he does not say that he witnessed the marriage, but that he knew about it at the time, and was present at dinner at the same table with them. In his deposition before special examiner, January 15, 1891, he says he was not present at the ceremony, but was told they had been married, and took supper with them. In his affidavit of September 22, 1893, he says he was present at the marriage and relates the circumstances, and names several persons who were also present.

Mr. Deyo made affidavit in the case May 24, 1887, in which he says he first became acquainted with John S. Daniels and his wife, Kittie M. Daniels, in 1868. In an affidavit made March 14, 1894, he says he first knew said Kittie M. Daniels in 1862, and was present at her marriage to John S. Daniels and witnessed the ceremony. He repeated this statement before Special Examiner Craig, December 3, 1896, with recital of facts and circumstances, and said that his cousin, James C. Deyo, of Jackson, Mich., was present.

A special examiner who visited Jackson, Mich., to obtain the affidavit of said James C. Deyo, found that he had been dead several months.

The affidavit of Mr. Deyo of March 14, 1896, would, *prima facie*, constitute acceptable evidence of the alleged marriage were it not that in his affidavit of May 24, 1887, which was filed as a part of claimant's proof, he did not claim to have been a witness to the marriage, but said he first knew the parties in 1868. This contradiction is too serious to allow to Mr. Deyo's subsequent statements the full faith and credit to which they would otherwise appear to be entitled. It is therefore held that the parol testimony is not sufficient of itself to prove the ceremonial marriage as alleged.

The question then is whether the life and conduct of the parties was such as that under the laws of Michigan they became legally husband and wife from the commencement of their cohabitation in 1862.

The facts established are that pensioner when a young girl, under 17 years of age, commenced living with the soldier as his wife at the house of his parents. They

claimed to have been married, were received as such, and were publicly so acknowledged. She had one child by the soldier before he enlisted in the Army. The next summer, her husband being sick, she joined him in the Army, taking her child with her, and nursed him and remained with him throughout his service, maintaining herself by cooking for the officers, and was recognized in the company as the wife of the soldier. She returned to Michigan with the soldier when the company went home to be mustered out. She was then six months gone with her second child.

It appears that shortly after their return a drunken dispute arose between the soldier and Lieutenant Finley, owing to a sudden fit of jealousy on the soldier's part, which resulted in Finley's offer to take her and to take care of her. Mrs. Daniels tells a pitiful story of this affair. She says that she fainted in the parlor of the hotel where they were stopping and was taken to her room, and that Lieutenant Finley took her child in his arms and carried it up and down the hall, and while so engaged her husband came in and accused Finley of having had improper relations with her, attributing her fainting to this cause. Her husband had been drinking for a long time and was then much intoxicated. He abused Finley, who finally said, "Daniels, if you will give up all right and title to that little girl I will take her and support her." She says she told her husband, "For the Lord's sake, if you will go off and leave me alone I don't care what anybody does with me." He said, "I am going to let that ——— know that I ain't going to let him do what he wants with you and let me take up with his leavings." I said, "John, I would rather take Jim Finley and live with him if he would stoop low enough to take me after living with such a brute as you are." The quarrel proceeded, and the next day, in company with Daniels, they went to a minister and were married. She says that Finley told her they were not legally married, but as soon as a divorce could be obtained she would be his wife.

It appears that this arrangement was of brief continuance and that the pensioner soon returned to her husband and continued to live with him thereafter. They had six children in all, five of whom were born after the Finley affair. There are four children still living. The soldier always acknowledged the children as his own.

It also appears that after her pension was suspended the pensioner tried to get Finley to take her, but he refused to have anything to do with her. He had then been married to a woman with whom he has lived as his wife for the past twenty years. Lieutenant Finley substantially confirms pensioner's statement, and says his marriage to her was the result of a drunken freak, but he has supposed it was nevertheless a legal marriage, and he has been in great trouble about it on account of the position in which it places him and the effect upon his family.

There can be no doubt that if Lieutenant Finley and Mrs. Daniels had each been free to marry their marriage was legal, and the subsequent resumption of cohabitation between her and Daniels would have been a mere meretricious relation.

Equally there is no doubt that if the pensioner and Daniels were legally husband and wife at the time of the purported marriage to Finley the latter marriage was void, and the resumption of her relations with Daniels was the legitimate continuance of a lawful matrimonial union and Finley's subsequent marriage to his present wife was valid. In such case the Finley episode had no legal bearing or effect upon any of the parties.

Ordinarily, where a marriage is sought to be proved by cohabitation and repute, a subsequent ceremonial marriage by either of the parties is deemed to be in the nature of a rebuttal of the presumed intention with which they entered into their first relation. This is because the subsequent ceremonial marriage is presumed to have been freely and voluntarily contracted with an uncontrolled wish and desire to establish a new and valid connection. In the present case there was probably not that degree of duress which of itself would invalidate the ceremonial marriage. But this is not the question in the case. The question is whether the circumstances are such as to authorize the opinion that the ceremonial marriage should be deemed a rebuttal of the evidences of the former actual marriage proved by cohabitation

and repute. Here are two drunken and dissolute men who in passion of intoxication are quarreling over this woman, and the woman herself—abused, helpless, and wretched, and about to become a mother—in a moment of despair, assents to a marriage, she does not know or care whether legal or not so long as it takes her out of her present miserable condition. This is not such deliberate and voluntary act as denoted a repudiation of the former actual marriage intention, proved, as in this case, by more than usually convincing conduct. This woman, after being declared, accepted, and recognized as the wife of the soldier, actually goes to the field where her husband is serving to nurse him in his sickness, and remains there, sharing his hardships and recognized as his wife, and returns to her home with her husband and with the regiment when it is mustered out.

It is held in Michigan that where a marriage is proved by far less evidence of actual marriage intention and conduct than disclosed by this recital, whether there has been a ceremony or not, the parties are legally married in that State from the time of the commencement of such relation, and that such marriage carries with it all the rights, responsibilities, and legal obligations which follow a marriage by ceremony. (*Hutchins v. Kimmel*, 31 Mich., 126; *Peet v. Peet*, 52 Mich., 467.)

This being the law in Michigan, it follows that the soldier and pensioner were lawfully man and wife at the time of the pretended marriage to Finley, and that the pensioner remained, in law as well as in fact, the soldier's wife until his death and became his legal widow.

This opinion is, in the main, substantially correct. There is not, however, the strong proof of a common-law marriage between the soldier, John S. Daniels, and said Kittie M. Daniels which the opinion states there is; nor is she entitled, under the evidence, to the sympathetic consideration given her in said opinion. The evidence shows clearly that she has been, from her earliest womanhood, of very loose morals. The soldier, Daniels, too, was a man of low morality, associating promiscuously with women on terms of illicit intimacy, both prior and subsequent to his alleged marriage to the alleged widow.

He appears, however, to have had some genuine affection for her and she for him, as is evidenced by their long-continued association ostensibly, to some extent at least, as husband and wife, by the birth of six children as the result of such association and by her attendance on him while he was a soldier and sick. She appears to have left him and married Finley in 1865 in a fit of anger, and mainly because of his jealous and drunken rage and dissolute habits also, probably, and to have returned to him after her marriage to Finley mainly because Finley refused to support her according to her exorbitant desires. She then lived with said Daniels, however, for nearly or quite sixteen years, bearing him four more children.

Their association appears to have been at all times loose, as might well be expected of such characters. As stated, however, although each was quite ready at any time to take up with others illicitly, neither appears to have lived between 1862, when she first took up with him, and 1881, the date of his death, openly with any other as a matrimonial consort, except that she may have cohabited with Finley for a very short time only, although she denies any cohabitation with him.

It is difficult, if not impossible, to arrive at any clear and certain con-

clusion in this case. Substantial justice to all concerned will apparently be done, however, by holding that said Kittie M. and the soldier Daniels were husband and wife, and that she was, therefore, his lawful widow. Their long-continued association will warrant this conclusion; and the legitimacy of their children, now grown up and apparently of respectable character, will thus be unimpeached, so far as this consideration may affect that question. Appellant herself, the soldier's mother, does not appear to be wholly reliable in character, and one special examiner rates her as entirely unreliable.

Your rejection of the mother's claim is affirmed accordingly.

MARRIAGE—COLORED AND INDIAN SOLDIERS IN KENTUCKY.

MARIA MERRITT (COLORED WIDOW).

A claimant, as widow of a colored soldier, is pensionable under the general law, and is entitled to his accrued pension, upon proving her marriage, as prescribed in section 4705, Revised Statutes; but in order to be pensionable under the act of June 27, 1890, she must prove a marriage which is valid under the laws of the place where they resided at the time of marriage or when the right to pension accrued.

A slave marriage in Kentucky is not valid unless declared in conformity with the act of February 14, 1866, of the legislature of that State.

Assistant Secretary Webster Davis to the Commissioner of Pensions, April 10, 1899.

Joseph Merritt, a member, during the war of the rebellion, of Company K, One hundred and twenty-third United States Colored Infantry, was a pensioner, certificate No. 816882, under the act of June 27, 1890, at the time of his death, May 27, 1895, and left pending a claim for pension under the general law on account of dislocation of right leg.

On June 3, 1895, Maria Merritt, this appellant, filed a claim for pension, under the act of June 27, 1890, as his widow, and on April 7, 1897, a claim, also under the general law, both of which claims, as well as a claim, filed June 18, 1895, for his accrued pension, and the soldier's pending claim, were rejected November 1, 1897, in accordance with an opinion dated October 29, 1897, by the chief of the law division of your Bureau to the effect that she was not the soldier's legal widow, as they had failed to comply with the provisions of the act of February 14, 1866, of the Kentucky legislature, relative to the legalization of slave marriages in that State.

From these actions she appealed January 25, 1898, contending she is the soldier's lawful widow.

The opinion above mentioned, upon which these several claims were rejected, is as follows:

It may be accepted as established that claimant and soldier contracted a slave marriage in Kentucky prior to emancipation and continued to live together as hus-

band and wife until the soldier's death. They failed, however, to comply with the second section of the act of February 14, 1866, which reads as follows:

"SECTION 2. All negroes and mulattoes who have heretofore lived and cohabited and do now live together as husband and wife shall be taken and held in law as legally married and the issue held as legitimate for all purposes: *Provided*, Such persons shall appear before a clerk of the county court of their then place of residence and declare that they have been and desire to continue living together as husband and wife, when, upon receipt of fifty cents, the clerk shall make a record of such declaration, and for an additional fee of twenty-five cents shall furnish the parties with a certificate of said declaration. Said record or certificate shall be evidence of the existence of the marriage and the legitimacy of the issue born or to be born to said parties: *Provided*, The issue of customary marriages of negroes shall be held legitimate."

The Kentucky courts have held that "this enactment imports that without compliance with its prescribed requisition no such union can be itself a legal marriage. Without conformity to this statutory mode there is now no law in Kentucky to legalize cohabitation and recognition alone as marriage, the common and only law to that effect having been repealed; consequently, the appellee and Sally Ann never having made the required declaration since they became free were never husband and wife." (*Estill v. Rogers*, 1 Bush., 62; *Stewart v. Chandler*, 2 Bush., 278.)

As "marriages, except such as are mentioned in section 4705 of the Revised Statutes, shall be proven in pension cases to be lawful marriages according to the law of the place where the parties resided at the time of marriage or at the time when the right to pension accrued," claimant must be held never to have been the lawful wife of the soldier, and she is, therefore, not his widow.

Said section 4705 of the Revised Statutes provides that—

The widows of colored and Indian soldiers and sailors who have died, or shall hereafter die, by reason of wounds or injuries received, or casualty received, or disease contracted in the military or naval service of the United States, and in the line of duty, shall be entitled to receive the pension provided by law without other evidence of marriage than satisfactory proof that the parties were joined in marriage by some ceremony deemed by them obligatory or habitually recognized each other as man and wife, and were so recognized by their neighbors, and lived together as such up to the date of enlistment, when such soldier or sailor died in the service, or, if otherwise, to date of death; and the children born of any marriage so proved shall be deemed and held to be lawful children of such soldier or sailor, but this section shall not be applicable to any claims on account of persons who enlist after the third day of March, one thousand eight hundred and seventy-three.

The chief of the law division overlooks in the above-quoted opinion the very important and material bearing of this section of the law upon the several claims in this case. By its express terms this section applies solely to cases where a colored soldier dies by reason of some wound, injury, casualty, or disease of his military service; and by a multitude of decisions of the Department it has been held to be applicable to widows' claims under the general law only (see *Juda Hughes*, 7 P. D., 107; *Lettie Hawkins*, 8 P. D., 22, and many others), and not to claims under the act of June 27, 1890, as pension under that act is not conditioned upon the service origin of the soldier's death cause (see *Polly Ann Chulaska Sinla*, 7 P. D., 353; *Lettie Hawkins*, *supra*; *Marie L. Bass*, 10 P. D., 36; and also many others).

This radical difference in the laws governing these two classes of

claims, as to the question of marriage, has been so fully considered in these prior decisions that no special discussion of that phase of this case is necessary herein. Your rejection of appellant's claim for a widow's pension under the general law was clearly contrary to the settled ruling of the Department and the practice of the Pension Office, and is reversed accordingly.

It has also been settled by these departmental decisions that a claim for widow's pension under the act of June 27, 1890, is governed, as to the question of marriage, by the law of the place where the parties resided at the time of marriage or at the time the right to pension accrued. Also, that a slave marriage in Kentucky is not a legal or valid marriage, according to the laws of that State, unless the parties conformed to the requirements of the act of February 14, 1866, of the Kentucky legislature, which is quoted in said opinion by the chief of the law division. (See *Estill v. Rogers*, 1 Bush, 62; *Stewart v. Mundchandler*, 2 Bush, 278; *Nannie Roach*, 7 P. D., 80.)

Inasmuch as this appellant admits that her slave marriage was never declared in conformity with said act of February 14, 1866, she is not, under the laws of the State of Kentucky, the soldier's lawful widow, and is not, consequently, pensionable as his widow under the act of June 27, 1890. Your rejection of her claim for pension under that act was therefore correct, and is affirmed.

The question of marriage as regards appellant's title to the soldier's accrued pension is one of some difficulty, and I am aware of no departmental decision decisive of that question, which involves consideration of several laws—the act of August 7, 1882, and section 4705, Revised Statutes, above mentioned, and the act of March 2, 1895, as to accrued pension.

The last-mentioned act provides that—

* * * the accrued pension to the date of the death of any pensioner, or of any person entitled to a pension having an application therefor pending * * * shall, in the case of a person pensioned, or applying for pension on account of his disabilities or service, be paid, first, to his widow. * * *

Marriage is recognized as a personal domestic status within the exclusive control of the State where the parties reside (*Stewart on Husband and Wife*, sec. 9; *Stone v. Gazzam*, 46 Ala., 269; *Patterson v. Gaines*, 6 How., 550); and the decisions of the courts of the State construing the marriage laws of that State are binding upon the United States Supreme Court (*Meister v. Moore*, 96 U. S., 76; *Meister v. Bissell*, *ibid.*, 83; 2 Black, 599).

Recognizing this fact of law that marriage is, under our form of government, a local status solely, Congress passed an act approved August 7, 1882, declaratory of and adopting for pensionable purposes generally (with but one exception), this rule of law as to the validity of marriages, the one exception being in the cases of colored and Indian soldiers who may die from a cause due to their service, the pen-

sionable widow of such being those who may prove the pseudo or quasi matrimonial relation with the soldier which is described in said section 4705 of the Revised Statutes, although they may not be able to establish a valid *lex loci* marriage.

The general rule as to proof of marriage in all pension cases is unquestionably that laid down in said act of August 7, 1882, and this rule applies as clearly to claims for accrued pension as to claims for original pension. In both classes of claims a widow claimant is required, as a general rule, to prove her marriage to the soldier by the *lex loci*, as prescribed in that act.

But what effect may section 4705 have upon this question where the deceased soldier was colored? If he died from a cause due to his military service, will the claimant as widow be entitled to his accrued pension upon proof of marriage as prescribed in that section merely, or must she show a valid *lex loci* marriage under the act of August 7, 1882? Or, if it be not shown that his death was due to his service, is she entitled to his accrued pension upon showing a valid marriage under State law?

Important in this consideration are the antecedent acts of July 4, 1864, June 6, 1866, and June 15, 1866, upon which said section 4705 of the Revised Statutes was based.

Said act of July 4, 1864, provided that—

The widows and children of colored soldiers who have been or may be hereafter killed, or who have died, or may hereafter die, of wounds received in battle, or who have died or may hereafter die of disease contracted in the military service of the United States, and in the line of duty, shall be entitled to receive the pensions now provided by law, without other proof of marriage than that the parties had habitually recognized each other as man and wife, and lived together as such for a definite period next preceding the soldier's enlistment, not less than two years, to be shown by the affidavits of credible witnesses: *Provided, however,* That such widow and children are free persons: *Provided, further,* That if such parties resided in any State in which their marriage may have been legally solemnized, the usual evidence shall be required.

Said act of June 6, 1866, repealed the act of July 4, 1864, above quoted, and provided that—

The widows and children of colored soldiers and sailors who have been or may be hereafter killed, or who have died or may hereafter die of wounds received or of disease contracted in the military or naval service of the United States, and in the line of duty, shall be entitled to receive the pensions, bounty, and back pay provided by law, without other evidence of marriage than proof satisfactory to the Commissioner of Pensions that the parties had habitually recognized each other as man and wife and lived together as such.

And the act of June 15, 1866, provided that—

In determining who is or was the wife, widow, or heirs of any colored soldier, evidence that he and the woman claimed to be his wife or widow were joined in marriage by some ceremony deemed by them obligatory, followed by their living together as husband and wife up to the time of enlistment, shall be deemed sufficient proof of such marriage for the purpose of securing any arrears of pay, pension, or other allowances due any colored soldier at the time of his death.

It is apparent, I think, from a careful reading of these three antecedent laws, that they were intended, as was section 4705 of the Revised Statutes, to be applicable only to cases where the soldier, colored, dies by reason of his military service. Each of these four laws so provides expressly, and there is little room for construction upon that question. It may be accepted as the undoubted import, intent, and scope of the law.

And it is unquestionable, also, as above seen, that proof of the matrimonial relation as prescribed in section 4705 is sufficient to support a widow's pensionable status under the general law.

The only real question of any doubt is as to what "pension provided by law," as stated in said section, such widow is entitled to receive, upon making the proof of marriage therein mentioned. The several acts upon which said section 4705 was based, however, show clearly that these widows—that is, those of colored soldiers whose deaths were due to service, and whose marriage to the claimant was proved as therein stated—should receive whatever benefit the pension laws give to a soldier's widow, whether original or accrued pension, back pay, or bounty. Such widows were to receive the same benefits as any widows, "the pensions now provided by law," as the first act states, or "the pensions, bounty, and back pay provided by law," as the second one states, or "any arrears of pay, pension, or other allowances due any colored soldier at the time of his death," as the third act still more pointedly states.

The word "pension," therefore, in said section 4705, though a general term, should be construed in the light thus afforded by the past legislation on the same subject; and so construed, it seems clear that it should be held to include accrued pension, and not confined merely to the original pension allowable to a widow, as a strict reading of the section by itself alone might lead one to infer is its scope. This latter construction would be a limited, technical one, not in consonance with the spirit of pension legislation nor conformable to the rules of construction of successive statutes on a subject.

Where a doubt exists as to the meaning of a statute, the preexisting law and the reason and purpose of the new enactment are considerations of great weight. (Sutherland on statutory construction, sec. 162.)

I am therefore of the opinion that if this appellant proves that the soldier died from a cause due to his military service she is entitled to his accrued pension, as well as to original pension, upon proving a marriage to him as prescribed in section 4705, Revised Statutes, or, as such marriage appears, from the opinion by the chief of the law division, to be proved, she would be entitled to such accrued pension upon proving that his death was due to his service.

And her title to this accrued pension, or to original pension as widow under the general law, would not be affected by the laws of Kentucky as to her alleged marriage to the soldier, for said section states

expressly that she "shall be entitled to receive the pension provided by law without other evidence of marriage" than is mentioned therein. Whatever may be the laws of Kentucky, therefore, she would be entitled to this pension or these pensions notwithstanding.

If, however, a widow claimant on account of a deceased colored soldier is unable to establish that his death was due to his military service, she would unquestionably, in order to be pensioned under the general law (or the act of June 27, 1890) or to receive his accrued pension, have to show a valid *lex loci marriage*, as required by the act of August 7, 1882.

As already seen, this appellant can not be considered, under the laws of Kentucky, as the soldier's widow. Her claim under the act of June 27, 1890, therefore was properly rejected. The rejection of her claim for accrued pension, however (which includes the rejection of the soldier's pending claim), was erroneous, as she would be entitled to such pension upon proving that his death was due to his service, and her marriage according to the provisions of section 4705, Revised Statutes.

Your rejection of her original claim, under the general law, and of her claim for accrued pension and of the soldier's pending claim is reversed, and you will readjudicate each in accordance with the foregoing. The rejection of the claim under the act of June 27, 1890, is affirmed.

MARRIAGE AND DIVORCE—IMPEDIMENT—PRESUMPTION OF DEATH.

CATHARINE CONROY (ALLEGED WIDOW).

1. Claimant's husband, Matthew Lambert, deserted her, and she thereafter was married by ceremony to John Conroy, in the State of Pennsylvania. There are no facts other than desertion on which to found a presumption of death. *Held*, Claimant is not the widow of John Conroy. (Sarah C. Hayden, 8 P. D., 364; Helen L. Pepper, 9 P. D., 500.)
2. Marriage, in pension cases, is to be proven under section 2, act of August 7, 1882, and this Department will be generally guided, though not absolutely bound, by the construction placed upon the laws of a State by their courts of last resort, following the rule adopted by the United States Supreme Court.
3. Any statement in the opinion in the case of Margaret L. Thomas (9 P. D., 139), which conflicts with said rule is hereby modified.

Assistant Secretary Webster Davis to the Commissioner of Pensions, April 12, 1899.

The appellant herein, Catherine, alleged widow of John Conroy, formerly a private in Company C, Fourth United States Infantry, filed her application under the act of June 27, 1890, on December 24, 1890, claim being rejected on October 1, 1895, on the ground that claimant was not the widow of John Conroy. An appeal filed on January 5, 1898, contends that rejection is contrary to law.

The salient points in this case are as follows: It appears that claimant first applied for a pension as the widow of one Matthew Lambert of the State of Pennsylvania, alleging him to have been a member of

the Ninety-eighth Pennsylvania Volunteer Infantry, and that he was killed in the service. An investigation showed that said Lambert was never in the service, and she thereafter filed a declaration as stated above, claiming as the widow of John Conroy. She alleged in this connection that she was married to Lambert in 1852 or 1853, lived with him some few years, and that Lambert finally deserted her. Hearing that he had gone to the "frontier" (wherever that may be) and had been killed, she married Conroy in 1867, filing an affidavit in support of such statement signed by one C. F. Patterson, pastor of St. Joseph's Church, Ashland, Pa., reciting that Catherine Lambert and John Conroy were married on November 9, 1857, by the Rev. J. O'Reilly. More affidavits were called for, and she responded by swearing that she lived with Lambert until about 1862 or 1863. That he was a hard drinker and brutal, finally deserting her, and when she heard he was dead she married Conroy in 1867, in proof of which she files affidavits in which affiants state that they were present at this wedding in 1867, and that before the priest would perform the ceremony he wrote to Philadelphia and found that Lambert was dead, which letter he read at the altar. This date is sworn to in an affidavit of P. H. J. McGettigan, rector of St. Joseph's Church, Ashland, Pa. Claimant, on being asked for more explanation, responded by swearing that she never had been married to Lambert, and that she had lived with Conroy as his wife, and had since his death remained his widow for a space of forty years. This fact, if true, would show the attempted marriage with Conroy to have taken place in 1857. Being asked for more evidence concerning her various statements, she filed on August 5, 1895, an affidavit in which she stated, regarding Lambert, "Don't know whether he is alive or dead, and don't care." Other interesting facts found in various affidavits are to the effect that claimant lived with Lambert but six months, that claimant was married to Lambert in either 1860 or 1861, that Lambert died in the West, was killed in battle, was a member of the Regular Army, was a member of the Volunteer Army, died previous to 1857, was alive in 1862, died between that date and 1867, and that it is not known whether he is dead or alive.

Out of all these conflicting statements, many of which are necessarily false. I am asked to find that Lambert is dead as a fact; that he is presumed to be dead before the marriage to Conroy, and that, consequently, claimant is the widow of John Conroy, the act of March 13, 1896, being invoked.

The effect of the act cited is but to establish a rule of evidence in certain cases, those cases referring wholly to "an enlisted man or officer." Inasmuch as the question is as to the death of Lambert, who was not an officer or enlisted man, the statute does not apply. The rule as to the presumption of death is not different, however, in the case of one not a soldier, and is the one stated in *Davie v. Briggs* (97 U. S., 628), often quoted of late by this Department. The question of a desertion

of a wife by her husband, as affected by this rule, was discussed by me in the case of Helen L. Pepper (9 P. D., 500), and I therein held:

The fact of desertion alone is not sufficient for the purpose; on the contrary, it fully explains the absence of her former husband, and howsoever long the desertion continues, no ground will be thereby afforded upon which to prove his death.

This proposition is sound, and rests upon the only foundation on which the rule itself is based.

Reference is made in the appeal to the doctrine enunciated in the submitted case of the widow of William B. Thomas (9 P. D., 139), and the application of said case to the one under discussion deserves more than passing consideration. It is claimed by the attorney herein that no matter when the marriage between claimant and Conroy took place, it must be admitted, under the ruling in the Thomas Case, that if Lambert is presumed to be dead, upon such presumption taking effect, the marriage between Conroy and claimant became a valid and legal one. Admitting that the presumption of death does attach in the case at bar (which is not true), how does the holding in the said Thomas Case affect the present one.

Mrs. Thomas swears that she married Thomas in the State of Michigan, under the supposition that he was a single man, and that it was not until after his death that she discovered among his papers evidence of the true facts, which were as follows: At the time of her marriage, in 1875, Thomas had a wife living, who, however, obtained a divorce from him in 1877. I held, after discussion, that the union between Thomas and claimant was a valid marriage. But note well that said holding was made by reason of the law as stated by the supreme court of Michigan in the case of *Williams v. Newell* (68 Mich., 279), upon an equivalent state of facts. Such holding was based upon section 2, act of August 7, 1882, which directs that certain marriages, which included the Thomas marriage, should be proved "according to the law of the place where the parties resided at the time of marriage." The Thomas marriage having taken place in Michigan, I accepted the holding of the supreme court of that State upon the point at issue.

At this point I desire to call attention to the last three lines of the opinion in the Thomas Case, viz:

Not only under the *lex loci* of the State of Michigan, but, as pronounced by Judge Cooley, "such is the settled doctrine of the American courts."

This quotation from Judge Cooley was used by him (and quoted in the Thomas appeal) in the case of *Ketchum v. Kimmel* (31 Mich., 126). An examination of the opinion in that case, in fact the quotation from the case as found on page 141, 9 P. D., shows that it was used in connection with a discussion of what constitutes a common-law marriage, the full statement being:

Where parties agree presently to take each other for husband and wife, whatever the form of ceremony, or if all ceremony be dispensed with, and from that time live professedly in that relation, this under the laws of this State constitutes a valid marriage; and such is the settled doctrine of the American courts.

This refers in no wise to any other issue than that of a common-law marriage, and it is undoubtedly a clear statement of the basis of a common-law marriage. Now Judge Cooley in further discussion of the principles goes on to say, the following language immediately succeeding that already quoted:

Marriage between parties capable of contracting is of common right, and valid by a common law prevailing throughout Christendom.

Note that in following up the discussion Judge Cooley expressly recognizes one of the first principles required in any marriage, which is, "parties capable of contracting," the *sine qua non* in all marriages being capacity of contracting parties and mutuality of consent. No marriage, so far as I have discovered, has ever been held valid unless the parties were "capable of contracting."

Just here, where all courts agree, the courts of last resort in a certain few of the States of our Union forsake the path most generally followed and go to great length in allowing a common-law marriage to be presumed as arising after some impediment has been removed, which impediment when the marriage first took place barred the capacity of one or both of the contracting parties. The States which allow the greatest latitude in this matter are Indiana, Michigan, Iowa, and perhaps Ohio. But even in these States there is no general rule followed, each case seeming to depend upon the peculiar facts which surround the particular one under discussion. The rule followed in nearly all of our States is that the marriage relation, void at first, can only become a valid one upon showing certain facts, from which facts a new and valid marital relation may be presumed. In fact the first marriage does not become a valid one, for it was void, absolutely null; but a new marriage has taken place, evidenced by facts shown. This particular doctrine was well stated in the departmental decision in the case of *Eliza Ann Server* (7 P. D., 468), where it was said:

The marriage does not rest on a void relation, but on a contract entered into when the parties could contract.

Now, as recited, the States mentioned have sometimes allowed great latitude in allowing a presumption of marriage to arise upon facts being shown, while most of the States do not base the disputed marital relation upon presumptions, but upon the facts themselves, and in following out the principles even the greater portion of the States have not established any certain line of fact which must be shown, but have dealt with the issue with more or less leniency, according as in the judgment of the courts the particular case demands. There can be no question but that the consensus of opinion is to the effect that cohabitation, illicit at inception, will be considered to be continued as illicit after the impediment is removed, unless a new relation is shown to have been entered into. (Stewart on Mar. and Div., sec. 132; 1 Bish. on Mar., Div., and Sep., sec. 961; Wharton on Ev., sec. 1298; Ann

Eliza Server, 7 P. D., 468). It must, however, be conceded that even the courts of some of the States in which the strictest marital principles are adhered to have rendered conflicting opinions upon practically the same state of facts, and have stretched facts and principles to an almost breaking point. But however this may be as to many of the States there can be no question as to the rule observed by the courts of Pennsylvania, in which State the case at bar arises.

The rule as to the State of Pennsylvania was discussed by this Department in the case of Sarah C. Hayden (8 P. D., 364), plentiful citations from the reports of that State being set out. In the quotation therein from the leading case of Munt's appeal (86 Pa. St., 294), the following is found:

A relation shown to have been illicit at the commencement is presumed to continue so until proof of change. Such a relation raises no presumption of marriage.

This doctrine was followed in the Hayden Case and also in the appeals of Lavisen S. Hoepfner (9 P. D., 497) and Indiana Christie (10 P. D., 15). It is the unquestioned law of the State of Pennsylvania, and will be adhered to by this Department.

Referring again to the quotation from Judge Cooley in the last three lines of the Thomas Case, *supra*, I reiterate that such quotation referred only to the basis of a common-law marriage, and has no application—neither did Judge Cooley intend it to apply—as a proposition regarding the necessity of a “capacity to contract.” I admit that under the holding in the Thomas Case the general scope of the effect of Judge Cooley's quotation is somewhat ambiguously stated, and I desire therefore at this time to expressly disavow and disclaim any intention to make the proposition a general one or as having any bearing whatever upon the “capacity to contract,” and to reaffirm the statement so often made by the Department, that the law of the State in which the issue arises must be the criterion. The language used in the Thomas Case is not to be construed in any other manner.

Summing up the facts and law in the case at bar, I find that claimant was originally married to one Lambert, who at an unknown date deserted her. The claimant having a living, undivorced husband entered at some unknown date into a marital relation evidenced by a ceremony with the soldier John Conway, said marital relation being null and void on account of the incapacity of claimant to contract a valid marriage; that said incapacity arose by reason of the fact that there is no presumption that Lambert was dead at the time of the union of claimant and Conroy, and that there is no presumption that he since died; that by reason of the above, claimant is not the widow of John Conroy.

I further find as a matter of law, that under section 2 of the act of August 7, 1882, that—

Marriages, except such as are mentioned in section 4705, Revised Statutes, shall be proven in pension cases to be legal marriages according to the laws of the place

where the parties resided at the time of marriage or at the time when the right to pension occurred.

Following the rule adopted by the Supreme Court of the United States, this Department will be generally guided (but not absolutely bound) as to the interpretation of the law of the different States by the construction placed upon said laws by the courts of last resort in said States. Any statement in the decision in the case of Margaret L. Thomas (9 P. D., 139) that conflicts with the above holding is hereby modified to conform to the views herein expressed.

I further reaffirm the doctrine laid down by this Department in the Server Case, supra: In these cases—

The marriage does not rest upon a void relation, but on a contract entered into when the parties could contract.

The action appealed from is affirmed.

FEE—PRACTICE.

MILES GILDER (CLAIMANT).

FAY F. ROOT (ATTORNEY).

Appellant's claim under the act of June 27, 1890, was allowed at the rate of \$8 per month from date of filing his claim, July 14, 1890; at the same time his claim under the general law was allowed at \$4 per month from January 13, 1890, but the Bureau of Pensions refused to issue a certificate thereon, as it would not afford claimant any benefit as the full amount of pension would be required to pay the attorney's fee (\$25) in the case. The attorney in the case waived the fee agreements and agreed to receive a fee of \$10, and claimant requested the issue of a certificate.

Held: That under these conditions the certificate must be issued in the claim under the general law.

Assistant Secretary Webster Davis to the Commissioner of Pensions, April 17, 1899.

On February 28, 1899, there was filed a motion for reconsidering the decision of the Department of February 15, 1896, in the claim for pension, under the general law, of Miles Gilder, Company G, One hundred and seventy-first Ohio Volunteer Infantry.

Said claim was filed January 13, 1890, and was approved for allowance June 5, 1891, at \$4 per month, for disease of lungs. At the same time, Mr. Gilder's claim under the act of June 27, 1890, was admitted at \$8 per month, commencing July 14, 1890, date of filing. On June 13, 1891, certificate issued to allow pension in said claim. Thus the accrued pension under the general law amounted to \$24 in all. Articles of agreement for a fee of \$25 were on file and approved. The Bureau refused to issue a certificate in the general-law claim on the ground that such issue would afford the claimant no benefit, as the full amount of pension would be required to pay the fee.

Upon appeal, the Department held that the facts bring the question at issue within the rule laid down in the case of John Schoepf (7 P. D., 19), where it is held that the Commissioner of Pensions has no authority to refuse to issue a certificate because the amount of pension that would be secured by the allowance of the claim is not sufficient to pay the fee of the attorney, thus disapproving of the practice. However, the new rule was not made retroactive, and therefore the action of the Bureau in this case was affirmed.

If it be held that there is no law authorizing the Commissioner of Pensions to refuse to issue a certificate for the reason assigned, and it was so held in the Schoepf case, and I think the holding is sound, it is exceedingly difficult to understand upon what ground the refusal is continued to issue a certificate in this case, whether the rule laid down in Schoepf's case is retroactive or not. However, in this particular case the attorney proposes to waive the provisions of the fee agreements and accept a fee of \$10. On April 15, 1898, he filed such waiver and a request of the claimant to have certificate issue. They read as follows:

FARMDALE, OHIO, April 4, 1898.

HON. COMMISSIONER OF PENSIONS,

Washington, D. C.:

I hereby waive all my rights under fee contracts on file in the original invalid claim for pension No. 748921, in case of Miles Gilder, late of Company G, One hundred and seventy-first Ohio Volunteer Infantry (since pensioned by Certificate 596638), and request that said claim be allowed and a fee of \$10 certified to me.

FAY F. ROOT, *Attorney.*

KINSMAN, OHIO, April 4, 1898.

In view of the above waiver of all right in fee contracts now on file in favor of Fay F. Root, attorney above named, I hereby request that a certificate issue to me under my general-law invalid claim herein named, the same as if no fee contracts were filed, and that a fee of \$10 only be certified to said attorney.

MILES GILDER,

Late of Company G, One hundred and seventy-first Ohio Volunteer Infantry.

If there is no law authorizing the Commissioner of Pensions to refuse to issue a certificate for the reason assigned, there is law which constantly commands that the Commissioner of Pensions issue the certificate, else there is no law on the subject at all. It is the duty of the Secretary of the Interior and the Commissioner of Pensions to execute the law, as well as to determine what the law is relative to pension claims. Now, in this particular case the law has been determined with the injunction that it be not carried into effect. My attention has not been called to any other case where the conclusion was reached as to a claimant's rights, accompanied with a direction that the law relative thereto be not fully carried out, though as to some particular concerning them the law at some prior time had been construed in derogation of those rights.

The question is not one of practice; it is one of law, and a legislative enactment can not be changed by those whose duty it is to construe

and enforce the law. Whatever construction is placed upon the enactment by those whose duty it is to construe it must be enforced.

In this case the attorney has waived the fee agreements; this he can do as certificate has not issued to allow pension. The claimant has requested that certificate issue. Under these conditions the law should be carried into effect. Therefore, for the foregoing reasons, this motion is sustained and the action of the Bureau is reversed.

SERVICE—ENLISTMENT—CIVILIAN EMPLOYEES—DESERPTION.

JOHN S. WILLIAMS.

1. The legal status of a man who becomes a voluntary substitute for a soldier, and serves and is discharged in the name of the soldier, is that of a civilian, as he was never enlisted or mustered into the military service of the United States. (Christian, alias Ernest Ulrich, 4 P. D., 411; Henry Bell, 5 P. D., 196; and Mary Brady, 9 P. D., 305.)
2. A civilian who served with the Army or Navy has no pensionable status under section 2 of the act of June 27, 1890. (John Laughlin, 9 P. D., 466.)
3. The time lost by desertion, where the deserter returned to his organization and was pardoned under the President's proclamation of March 11, 1865 (13 Stat. L., 752), is excluded in estimating the length of service required under section 2 of the act of June 27, 1890.
4. The evidence in this case shows that claimant is entitled to a credit of but one month and six days' service in the late war of the rebellion, under the act of June 27, 1890, which requires ninety days' service to entitle a soldier to a pension.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
April 19, 1899.*

John S. Williams, late private Company B, Eighty-third Pennsylvania Infantry, appealed June 7, 1898, from the Bureau action of November 9, 1897, rejecting his claim No. 1144717, filed January 26, 1893, under section 2 of the act of June 27, 1890, on the ground that he had not rendered ninety days' actual service in the war of the rebellion, as shown by the records of the War Department, and therefore had no title to pension under said act.

Claimant contends that his first discharge shows that he was enrolled in Company H, Fifty-fifth Regiment Pennsylvania Emergency Militia, on June 27, 1863, and was discharged on August 26, 1863, making sixty days' service; that his second discharge shows that he was enrolled on February 22, 1864, and discharged May 5, 1865, making one year two months and thirteen days' service; a total service of one year four months and thirteen days.

The War Department reported July 30, 1897, that it did not appear from the records of their office that such an organization as Company H, Fifty-fifth Pennsylvania Enrolled Militia, was ever mustered into the service of the United States.

The Second Auditor of the Treasury Department reported April 1, 1893, that the records of that office showed that Pierce A. Williams

was paid as sergeant of Company H, Fifty-fifth Regiment Pennsylvania Emergency Militia, for the period from June 27, 1863, to August 26, 1863, on the muster-out rolls of the company.

Claimant alleged in his application for pension that he served in said Company H, Fifty-fifth Regiment Pennsylvania Emergency Militia, under the name of Pierce A. Williams; and in an affidavit filed January 26, 1893, he testified that the way he came to assume the name of Pierce A. Williams was that he had a brother of that name who had enlisted in said organization, and, when the day came to go, his brother for some reason could not go and he took his place and assumed his name and served in that capacity until his discharge; that he was honorably discharged from said company as Pierce A. Williams.

The legal status of a man who becomes a voluntary substitute for a soldier and serves and is discharged in the name of a soldier is that of a civilian, as he was never enlisted or mustered into the military service of the United States. (Christian, alias Ernest Ulrich, 4 P. D., 411; Henry M. Bell, 5 P. D., 196; and Mary Brady, 9 P. D., 305.)

In the case of Ulrich, above cited, the claimant, Christian Ulrich, took the name and place of his father, Ernest Ulrich, and served under his father's name with the consent of the officers up to 1864, when he enlisted as a veteran. It was held that his service, up to the date of his enlistment as a veteran volunteer, January 24, 1864, showed that his status was that of a civilian or nonenlisted man, but that his enlistment at said last-mentioned date, placed him in the military service from that time forward to the date of his discharge, and the fact that he enlisted in his father's name was immaterial.

In the case of Henry M. Bell, above cited, the claimant took the name and place of his brother, who was sick in service, and served the remainder of his brother's term of service, being wounded in battle and taken prisoner. Yet the claimant was held to have been a non-enlisted man and not entitled to a pension under the provisions of section 4693, because his claim as a civilian had not been prosecuted to a successful issue prior to July 4, 1874, as provided in said section.

In the case of Mary Brady, above cited, her husband, James H. Brady, had served as a substitute for one Thomas F. Jessup, taking his place and name, with the tacit consent and acquiescence of the captain of the company, in pursuance of a private agreement with Jessup. It was held that Brady was never at any time in the military service, and his widow was not pensionable under section 4702, Revised Statutes. As was held in the case of John Laughlin (9 P. D., 466), and cases therein cited, that a civilian who served with the Army or Navy has no pensionable status under section 2 of the act of June 27, 1890.

Considering now claimant's service in the Eighty-third Regiment Pennsylvania Infantry, it appears from the record of the War Department that claimant was enrolled February 22, 1864, and was mustered into service for Company B, Eighty-third Pennsylvania Infantry. He was received at draft rendezvous, Pittsburg, Pa., February 27, 1864,

and forwarded thence to his regiment March 17, 1864; that he failed to join his regiment, and no record of him was found until April 24, 1865, when he surrendered as a deserter at Meadville, Pa., under the President's proclamation of March 11, 1865. The War Department reported, under date of November 2, 1897, that—

He is regarded by this Department as having been absent in desertion from March 17, 1864, to April 24, 1865. He was therefore in the service, under military control, as a member of Company B, Eighty-third Pennsylvania Infantry, from February 22, 1864, the date of his enlistment, to March 17, 1864, and from April 24, 1865, the date of his surrender, to May 5, 1865, the date of his muster out of service.

The President's proclamation of March 11, 1865, above referred to, offered a pardon to all deserters who should, on or before May 10, 1865, return to service or report themselves to a provost-marshal, on condition that they return to their regiments and companies, or such other organizations as they may have been assigned to, and serve the remainder of their original term of enlistment, and in addition thereto a period equal to the time lost by desertion. (See 13 Statutes at Large, 752.)

The time lost by desertion, where the deserter returned to his organization and was pardoned under the President's said proclamation, is excluded in estimating the length of his service required under section 2 of the act of June 27, 1890.

The pardon by President Lincoln in his said proclamation of March 11, 1865, was a conditional pardon, and operated prospectively only, and upon the performance by the grantee of the conditions named in the pardon, unless the performance of the conditions were subsequently waived by the President. (*Ex parte Wells*, 18 How., 307.)

The effect of this pardon was to exempt claimant from the punishment which the law inflicted for the crime of desertion, but it did not affect the legal character of the offense committed. (*Bishop Crim. Law*, par. 989, and 17 *Encyclopædia of Law*, p. 317.)

In the case of *George W. Fleck* (7 P. D., 343) it was held that a soldier whose only service was rendered in compliance with the sentence of a court-martial his service was not such as was contemplated in the provisions of section 2 of the act of June 27, 1890.

In this case the period of desertion should be deducted from the period that ensued between the date of his enlistment, February 22, 1864, and the date of his muster out, May 5, 1865. The period of desertion extended from March 17, 1864, to April 24, 1865.

This is not a case in which the charge of desertion has been removed under the acts of August 7, 1882, July 5, 1884, May 17, 1886, or any other act of Congress.

The evidence in this case shows that claimant is entitled to a credit of but one month and six days' service in the late war of the rebellion, under the act of June 27, 1890, which requires ninety days' service to entitle a soldier to a pension.

The action appealed from is accordingly affirmed.

AID AND ATTENDANCE—RATE.

EPPENETUS W. MCINTOSH.

The rate in this case was reduced from \$72 per month to second grade upon evidence adduced upon special examination, showing that the former rating was excessive. The soldier is pensioned for "disease of spine and resulting curvature and insanity," and it is contended that by reason of his mental condition it is necessary to have an attendant secretly follow and watch him when he appears in public for his protection in case of necessity.

- Held*, 1. That such personal aid and attendance of another person, as it is contended is accorded the pensioner, is necessarily based upon apprehension that it may be—not upon the fact that it actually is—needed, and it does not therefore come within the purview of the provisions of either the act of March 4, 1890, or the act of July 14, 1892.
2. The allowance of the \$72 rate is not warranted merely because insanity happens to be one of the disabilities for which pension has been granted; but the degree of helplessness specified by law must be shown to exist before title to said rate is established. (James Caton, P. D., vol. 6, p. 159.)

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
April 20, 1899.*

Eppenetus W. McIntosh, late private, Company A, Fourteenth Illinois Infantry, who is now pensioned at \$30 per month (second grade) for "disease of spine and resulting curvature and insanity," was originally pensioned at \$8 per month from May 31, 1865, and \$18 per month (third grade) from February 1, 1881, for "disease of spine and resulting curvature." Under the act of March 3, 1883, the third-grade rate having been increased to \$24 per month, the rate allowed the pensioner was increased accordingly.

In his original declaration for pension, filed January 11, 1878, the soldier alleged that on or about August 15, 1864, he was captured as a prisoner of war and taken to Andersonville, Ga., where he was kept until some time in March, 1865, and—

That from exposure, want of proper food, scurvy, and gangrene sores he contracted curvature of the spine and other spinal and brain difficulties, from which he has suffered continuously.

When this claim was adjudicated it was legally approved February 24, 1881, for "disease of spine and resulting curvature, total (\$18) thereafter." No attention was paid to the alleged "brain difficulty" or disease of brain by either the legal or the medical reviewers.

It appears that the pensioner was subsequently declared insane by the county court of Livingston County, Ill., and confined for a short while in the insane hospital at Kankakee, Ill. On March 28, 1887, Elizabeth McIntosh, his wife and conservator, filed an application for increase on behalf of the soldier in which she alleged that his disabilities had increased to such an extent that he had become insane. This claim was adjudicated July 27, 1887, insanity being accepted as a result of pensioned causes, and the rate increased to second grade from May 4, 1887, the date of the medical examination held under the said claim.

Under an application for increase filed January 18, 1888, the rate was increased to \$50 per month (the then first-grade rate), which rate was subsequently increased to \$72 per month under the provisions of the act of March 4, 1890, no formal application for increase being necessary.

On the 29th of June, 1893, the Bureau received information that was considered reliable tending to show that the rate then allowed, \$72 per month, was excessive, and it was deemed expedient to have a special examination in the case with a view to determining whether or not a reduction in rate would be proper. Such examinations were held in September, 1893, and in April and June, 1895, respectively, and after due consideration of the evidence adduced at the said examinations, the following report thereon was submitted for the information and guidance of the Commissioner:

It appears from an indorsement on jacket dated August 15, 1895, that the wife of soldier was promised a home examination of her husband, he having failed to comply with order of the medical referee dated June 28, 1895, and she having represented to this Bureau that her husband was unfit mentally to go before the board and she herself confined to a chair and unable to take him, even if he were willing to accompany her, which he was not. The facts, as brought out in a special examination of this case, show it to be one of gross fraud; that the \$72 rate was probably procured dishonestly by collusion between soldier and wife. The man travels all over the State, from one end to the other, lecturing, singing, playing a guitar, and selling a photograph said to represent his condition when released from Andersonville. He has a license from the Methodist Conference to preach, and travels on half rates by reason of said license. He is able to go before the board in Indianapolis. He lives there himself, and there is no reason why he should have a home examination.

The examiner is of the opinion that this man's pension should be suspended until he shall appear for examination, which should be a test examination.

The accompanying reports (3) of special examiners show what has been this man's career, and that his wife's piteous letters are mere dissimulation.

Thereupon the Bureau, on November 6, 1895, notified the conservator of the pensioner of the intention to reduce the rate in the case from \$72 to \$30 per month unless satisfactory evidence that such action was not warranted should be furnished.

The testimony of two physicians and of several neighbors in rebuttal of the proposed action of reduction was filed on the 29th of November, 1895, and on January 29, 1896, a test medical examination of the soldier was held at Danville, Ind. The certificate of the said medical examination, after describing the subjective and objective conditions manifested at the said examination, states:

From history of case, from his general appearance, actions, and conversation, we find that this claimant is so totally and permanently helpless from insanity that he requires the regular aid and attendance of another person.

Upon the receipt of the said certificate the papers in the case were referred to the medical referee for an advisory opinion as to the propriety of carrying out the proposed action of reduction in rate. The said opinion was rendered March 25, 1896, and is as follows:

From a careful consideration of all the evidence in this case, and especially the special examiners' reports, it appears that the pensioner is not wholly sane and is

unfitted to perform manual labor, but he travels around his town and the country without an attendant.

He does not have outbreaks of violence nor give his family much trouble, unless he forms the conception that they are intending to return him to the asylum.

He requires neither the regular and constant nor even the frequent and periodical aid and attendance of another person, and his rate should be reduced to second grade.

His actions and manner before the board which examined him on January 29, 1896, are shown by their report to have been due to his erroneous idea that they were preparing to commit him to an insane hospital.

On January 21, 1897, formal action was taken on the brief face by which the rate was reduced from \$72 per month to second grade.

On May 5, 1897, at the request of Hon. C. W. Fairbanks, United States Senator, the papers in the case were again referred to the medical referee for his personal consideration and opinion as to whether or not the action of reduction was proper. Before rendering the said opinion another medical examination—before the board of surgeons at Indianapolis—was ordered. After describing the conditions manifested at the said examination the surgeons stated in their certificate:

In our opinion claimant's disability on account of disease of spine and resulting curvature and insanity exists to such a degree as to require the frequent and periodical, though not regular and constant, personal aid and attention of another person, and therefore advise the allowance of \$50 per month.

Upon the receipt of the said certificate the medical referee stated:

The evidence in this case tends to show that the claimant travels around the city of Indianapolis alone, but becomes violent when he forms the conception that anyone is trying to take him to an insane asylum.

The board reported that on July 7, 1897, he was rational, with a normal memory.

It is not believed to be shown that he requires even the frequent and periodical aid and attendance of another person within the meaning of the act of July 14, 1892, and therefore the action of reduction to second grade is regarded as proper.

On November 18, 1897, the conservator of the pensioner was advised of the cause of the reduction in rate and why the continuance of the \$72 rate was not warranted, and on December 4, 1897, an appeal from the said action was entered at the Department.

It is contended in the said appeal that the pensioner does require close and continuous personal attendance, as at each moment he is and has been shadowed by some one; that his mental condition has been such as to require a constant aid; that although he would not allow it without becoming unmanageable, the conservator was compelled to have some one follow him each moment, so that in case of trouble he might go to his rescue.

This appeal was referred to the Bureau December 11, 1897, for a report thereon, and on April 25, 1898, the papers in the case were transmitted to the Department with the opinion that the action appealed from should be adhered to, attention being invited to the accompanying advisory opinion of the medical referee, dated April 19, 1898, which is as follows:

A careful reconsideration of the evidence in this case warrants the conclusion that the reduction of soldier's pension to second grade was proper. It is assumed, but

by no means proven, that he requires aid and attendance. It is believed that the examining surgeons are misled by the soldier and those who attend him at the examinations. The evidence contained in the reports of special examiners can not be controverted by the evidence which has since come into the case. It is apparent that the examining surgeons in their report of July 7, 1897, have accepted the statement of the neighbor who attended the soldier at time of examination. It is believed that too much attention has been given to the "photo" which accompanies this case. In my opinion, the same should not be considered as authentic, but a fraudulent representation of a condition that never existed in this soldier's case.

The action of reduction was proper and should be adhered to.

The conclusions of the medical referee, as above set forth, are perhaps correct, but they can hardly be said to constitute a sufficient answer to the contentions of the appellant.

It will be observed that it is not contended that the soldier is so totally and permanently helpless by reason of the disabilities for which he is pensioned as to require the regular and constant personal aid and attendance of another person on account of his inability to dress and undress himself, feed himself, attend to the calls of nature, or travel about unassisted, or that he is so insane that it is necessary to have him confined in an asylum under the constant supervision of an attendant; but it is contended that it is necessary to have someone follow or "shadow" the pensioner whenever he goes abroad, in order that he may be protected from harm in case he gets into trouble through his disposition to become violent and abusive if crossed in an argument, especially on politics or religion. Such aid and attendance as this is necessarily accorded more by reason of apprehension that it might be required than by the fact that it is actually needed at all times and under all circumstances; and, in my judgment, it can not be held that aid and attendance of this character comes within the purview of the provisions of the act of March 4, 1890; neither is the allowance of the rate prescribed in the said act warranted merely because insanity happens to be one of the disabilities for which a pension has been allowed. In the case of James Caton (P. D., vol. 3, p. 121), Assistant Secretary Bussey held that—

Mere confinement in an insane asylum does not entitle to the first-grade rate on account of insanity; but to entitle to that rating the degree of helplessness specified in the law must be shown.

In view of all the facts presented in this case as herein set forth, it does not appear that the soldier is now, or ever has been, entitled to the rate prescribed in the various acts of Congress for total and permanent helplessness, or that he is now or has been at any time entitled to the benefit of the provisions of the act of July 14, 1892.

Therefore, in the light of the evidence now on file, it would appear that the allowance of the first-grade rate was error; that the action reducing the rate in the case to second grade—which action has been appealed from—was proper; and, inasmuch as no manifest injustice was done by the said action, the same is hereby affirmed.

It appears by the record in the case that the conservator has been

advised that, if the soldier's disabilities have materially increased since the action appealed from was taken, she is at liberty to file an application for increase, which will be duly considered.

RATE—ACT JUNE 27, 1890—DISABILITY.

EVLIN EARL.

The evidence on file at the time the pension was reduced showing that the pensioner could earn a partial support by manual labor, the reduction from \$12 to \$8 per month is held not to have been erroneous.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
April 20, 1899.*

Elvin Earl, formerly a soldier in Company E, Sixteenth Michigan Infantry, was in April, 1891, granted a pension under the act of June 27, 1890, at the rate of \$12 per month. In 1894 the rate was, after due notice to the pensioner, reduced to \$8 per month from and after June 4, 1894. An application for restoration of the former rate, filed April 5, 1895, was rejected in February, 1896. An appeal was filed January 15, 1898, the ground of which is stated therein as follows:

This soldier was originally pensioned under rulings promulgated by Hon. John W. Noble, Secretary of the Interior, and Green B. Raum, Commissioner of Pensions, by which rulings the act of June 27, 1890, was construed. His pension was reduced on rulings promulgated by Hon. Hoke Smith, Secretary of the Interior, and William Lochren, Commissioner of Pensions. There was no evidence or suspicion of fraud, but he was simply reduced on a ruling. I claim that whatever rulings may have been made by a subsequent Commissioner of Pensions defining the act so far as relates to matter of ratings could not legally be made retroactive, but could only apply to cases adjudicated after the promulgation of said new ruling. I claim that whatever claims were allowed under the former rulings could not legally be disturbed, as it must be admitted that they were legally granted under the rulings in force, and in the claim at bar we believe the claim was granted strictly in accordance with the provisions of the act of June 27, 1890. We therefore believe that the action of rejection of his claim for restoration was error and ask that said action be reversed and claim allowed.

The general question presented by the appeal is not new. The right of the Commissioner of Pensions (subject to the approval of the Secretary of the Interior and after due notice to the pensioner) to reduce or withhold pension which he may deem to have been improperly allowed has been repeatedly affirmed by this Department, by courts of law, and by acts of Congress. (See James Duval, 9 P. D., 218; Joseph A. Dudgeon, ib., 413; *Harrison v. United States*, 20 C. Cls. R., 122; *Long v. Commissioner of Pensions*, Sup. Ct. D. C., February 28, 1894; and acts of June 21, 1879, and December 21, 1893.)

Further discussion of this point is unnecessary. The only question to be considered is whether the reduction in this case was warranted by the law and the facts.

It is not contended that the pensioner was in 1894, or is now, disabled for manual labor to such an extent as to be unable to earn any part of a support. He stated to a board of surgeons who examined him on March 14, 1894, that he was "about one-third of a man at labor." The board reported that he could not do hard labor but could do light labor. He was 48 years old. After careful consideration I am of the opinion that the reduction of the pension to \$8 per month from June 4, 1894, was proper and should not be disturbed. The action of your Bureau is therefore affirmed.

DECLARATIONS—ACT JUNE 27, 1890—AMENDMENTS.

SIMON P. EAVES (DECEASED).

1. In the adjudication of this claim disability from insanity was not considered, because not alleged, although shown to have existed at time of filing declaration and continuously afterwards. This action was sustained by a decision of February 5, 1897, upon the ground that it was in accordance with the rules of practice. The claimant had died before such rejection and the rendering of said decision without filing supplemental declaration.
2. In the "instructions" relative to declarations under said act, dated July 28, 1897 (9 P. D., 93), said rules of practice were abrogated and others substituted, which permit the consideration of all disabilities proved to exist, whether alleged or not, in determining title. The former decision is accordingly overruled, and the action of the Bureau is set aside for the purpose of having claim readjudicated in conformity with said "instructions."

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
April 20, 1899.*

In the case of Simon P. Eaves, late of Company D, Thirteenth New York Heavy Artillery, for pension under the act of June 27, 1890, an appeal, in the nature of a motion for reconsideration of a decision rendered February 5, 1897, has been made by the attorney of record, citing the decision of December 15, 1897, in the case of William H. Hughes (9 P. D., 152), in support of the right to make such motion, and setting out all the contentions of the original appeal as ground of error in the action of the Bureau in rejecting the claim. The decision in the Hughes case merely refers to the right of a widow to file an appeal in an invalid claim which has been rejected without limitation as to the time of filing it, and is recognized as authority in the present instance.

The decision complained of, which is hereto attached, contains a full statement of all the facts connected with the filing of the invalid claim, the allegations of disabilities, the proof as to the nature and extent of the same, the basis of rejection by the Bureau, and the reasons for sustaining that action. It is unnecessary therefore to reiterate these facts, and reference need be made only to such salient features of the case as have application to the point now in issue, viz, the right of the widow in the determination of the soldier's title under said act of June

27, 1890, to have considered such disabilities as may have been proved to exist in ratable degree, but which had not been alleged by him.

It will be understood, then, that the first claim under said act was filed January 14, 1893, by the guardian or committee of soldier, who was insane. In this claim the insanity was not alleged, but other disabilities were, and only the latter were considered in the adjudication of the claim, which was rejected August 22, 1896, because no ratable disability from the causes alleged was shown to exist. This rejection was more than a year after the soldier's death, which occurred June 15, 1895. Appeal from the rejection was made by the widow, September 26, 1896, who contended that, inasmuch as the insanity of soldier was a fact proven and shown by medical examination during the pendency of the invalid claim, it should have been given due consideration as a disabling clause under said act, and a rating allowed on account of it, notwithstanding it had not been specifically alleged.

In the decision of that appeal it was pointed out that the Bureau was derelict in not giving the claimant notice of the necessity for alleging the insanity between the time when that disability was shown in the medical examination of February 19, 1895, and the date of the soldier's death, so that he might have remedied the defect in his declaration, but it was held further that under the rules of practice then prevailing—

since the filing of a supplemental declaration is a condition precedent to allowance for a disability not alleged in first declaration, but found on medical examination, the failure to file such supplemental declaration is fatal to the claim.

Thus the action of the Bureau was sustained under a rule of practice, and, the soldier being dead, it was too late for compliance with the requirements of said rule.

But the rule has been since changed by my "instructions," dated July 28, 1897, relative to declarations under said act of June 27, 1890 (9 P. D., 93). In these instructions it is held generally that "a declaration in the terms of the act shall be sufficient," and the third and fourth paragraphs of the same are as follows:

Should the medical examination disclose the existence of any disease, wound, or injury not alleged in the original or amendatory application which is a factor in the applicant's inability to earn a support by manual labor, the claimant shall be called upon to state under oath the time, place, and circumstance when, where, and under which such wound or injury was received or disease contracted and whether it was in any manner caused by vicious habits.

Should the wound, injury, or disease not specified in the original or amendatory declaration, but discovered on medical examination, be shown to have existed at the time when the original declaration was filed and it is found not to be due to vicious habits, it shall be taken into account, the same as if formally specified in the original application in estimating the degree of the permanent mental or physical disability to which it contributes.

It will be seen from the rules thus enunciated that the ground on which the former decision was based and the action of the Bureau was sustained is no longer tenable, but the rule then in force has been abro-

gated. Thus, there being no longer a necessity for a supplemental declaration, the consideration of the case reverts to the question of its merits under the evidence, and, inasmuch as the proof shows the existence of the insanity for years before the claim was filed and continuously to death, the only matter for adjudication is whether this disability, with others alleged, constituted such a condition of permanent incapacity for earning a support by manual labor as would give title under the act. In the former decision it was intimated that such was a fact, but it is not the intention now to pass upon this point, as it is not strictly within the issue made by the appeal, for although exceptions were raised and the evidence as to the merits was pointed out in said appeal, yet the action of the Bureau did not cover that question so as to embrace the disability from insanity in accordance with the "instructions" before mentioned.

It is sufficient, therefore, to state that the former decision is overruled, and to remand the claim for readjudication in accordance with the "instructions" relative to declarations and giving proper weight to all disabilities shown.

MARRIAGE—IMPEDIMENT.

SARAH F. SULLIVAN, NOW MORRIS (WIDOW).

The evidence shows the claimant's marriage to the soldier was invalid, he having at that time a former wife living and undivorced.

Assistant Secretary Webster Davis to the Commissioner of Pensions, April 21, 1899.

This appellant, Sarah L. Morris, on June 22, 1896, as Sarah L. Sullivan, filed claims (No. 636084) for pension under both the Revised Statutes and the act of June 27, 1890, as the widow of James F. Sullivan, who was a member during the war of the rebellion of Company E, Sixtieth Illinois Infantry, and died May 9, 1896, being at the time of his death a pensioner at \$72 per month.

Said claims were rejected in March, 1899, on the ground that the claimant is not the soldier's legal widow, he having at the time of his marriage to her a prior wife living from whom he was not divorced.

It is contended in this appeal, filed March 31, 1899, that the malice and prejudice of the soldier's mother and of some of his sisters should be considered in reviewing the evidence, and appellant be given the benefit of any doubts in the case, in order to sustain her marriage to him.

In view of the evidence filed with the appeal that appellant is in very necessitous circumstances the appeal is given immediate consideration.

Appellant was married to the soldier in December, 1874, and lived with him as his wife thereafter until his death, except that there may

have been one or more separations, due, it is stated, to her loose morals, but he was, it appears, very much attached to her, and each time resumed their matrimonial relations.

It appears also to be established that the soldier was married in March, 1871, to Caroline Perkins, a young school "chum" of his sister Theresa, who says, however, that Caroline was then under 12 years of age, and that, for this reason, her father came and took her away from the soldier, who was threatened with the penitentiary for marrying one under age. This sister testifies that the soldier himself told her his marriage to Caroline was not valid, as she was under age, and that he did not blame her father for taking her away. A brother of the soldier testifies, however, that Caroline was 14 or 15 years of age when she was married to the soldier.

He had one child by Caroline; and others of the soldier's family testify he lived with her for two or three years, when she left him and went with her folks to Hartsville, Mo., or to some place in Arkansas, where she was married, after she became of age, to a man by the name of Henson, without having obtained any divorce from the soldier.

After the soldier's marriage to this claimant Caroline had him arrested in Steelville, Mo., on a charge of bigamy; but the prosecution was dropped, some say, because the prosecutrix was threatened with a similar charge on account of her marriage to Henson, while the soldier's attorney at the time, a cousin, testifies at first it was because of a divorce from Caroline, but on reflection that he is satisfied it was because it was shown to the satisfaction of the prosecuting attorney and the court that the marriage to Caroline was not legal.

The soldier's sister Theresa, however, says she never heard of any prosecution for bigamy. Claimant, too, says she never heard of any such prosecution, although there was a warrant out for him about 1879 or 1880 at Steelville for impersonating an officer, to avoid which he ran away for a while, and his cousin, the attorney above mentioned, got him out of the scrape. In a later testimony she stated the only time she ever knew the soldier to have been arrested was at Steelville for pushing a woman in the fire.

It is stated that the court-house at Steelville has since been burned, so that record evidence of this is not procurable.

Claimant testifies further that she never knew the soldier had been married before he married her; that he never mentioned such a marriage, and never intimated that their own marriage was not valid; that she heard his folks, however, say before his death that he had been previously married, but she did not believe it and paid no attention to the matter, and that she never knew anything about Caroline Perkins.

Two other sisters of the soldier, however, testify that they often discussed, in claimant's presence and with her, his former marriage and its validity; and two witnesses who are unrelated corroborate these. One of these says the first person she heard say claimant's marriage

was not legal was claimant's second daughter, and she is certain claimant knew of his former marriage. The other unrelated witness says he heard the soldier say many times, and in claimant's presence, that she was not his legal wife.

There can not be much doubt that claimant was aware of the soldier's former marriage, and that it was, or was supposed to be, a bar to her own marriage to him.

It is true that most of the soldier's family—all, it appears, except probably Theresa—are much prejudiced against claimant. Their prejudice, however, is not unfounded, as it appears from her own testimony that she and her three daughters are of very low character.

She admits that in August, 1897, she took to board the man Morris, whom she has since married; that he and she slept in the same room of her house—a mere shanty of two rooms—although in different beds, she says; and such living together she considers entirely proper “so long as each attends to their own business.” Her three daughters, the youngest but 14 years of age, are common prostitutes.

Claimant, upon such admissions by herself and the testimony of others corroborative thereof, can not in good conscience expect much sympathetic consideration, or well complain of people's prejudice against her.

This well-founded prejudice of some of the soldier's family, however, is not shown to have so influenced any of them that they have testified falsely in any material particular. And the fact of her and her daughters' bad characters for chastity can not affect the question of her legal widowhood, which must be determined upon the facts in evidence as to the soldier's above-mentioned two marriages.

The proof is resolved into these: (1) That soldier and claimant were ceremonially married in December, 1874, and lived together thereafter as husband and wife, raising a large family of children, until his death, one child being born a month after his death; (2) that he was ceremonially married in March, 1871, to Caroline Perkins, who was yet living and was undivorced at the time of his marriage to claimant.

Upon these two findings, which are clearly established facts, it must be held that claimant's marriage to the soldier was void, and that she is not, therefore, his widow.

What effect the age of Caroline at the time of her marriage to the soldier might have upon the validity of such marriage need not be considered herein, as the evidence fails to establish that she was then under age; or, if it be held to be sufficient to establish that as a fact, it is not shown, further, whether she, when she became of age, ratified such marriage. The evidence upon these points is meager, conflicting, and wholly insufficient to establish the invalidity of the marriage to Caroline, which must be presumed to have been valid.

If the celebration of a marriage is proved, the validity of the marriage, the contract, and capacity of parties is presumed. (Stewart on Marriage and Divorce, secs. 125, 129.)

And the burden of proof is upon him who claims a marriage to have been invalid to show the invalidity. (*Erwin v. English*, 61 Conn., 502; *Boulden v. McIntyre*, 119 Ind., 574; *Stymest v. Stymest*, 4 Dist. Rep. Pa., 305; *Wilkie v. Collins*, 48 Miss., 496; 2 Am. and Eng. Enc. of Law, 654.)

In this case the presumption of the validity of claimant's marriage is overcome by the proof of the prior marriage as yet subsisting at the time of remarriage; and the original and primary burden of proof under claim being upon the claimant, it is incumbent upon her, upon such presumption being thus overcome and the counter adverse presumption in favor of the first marriage established, to prove that such first marriage was invalid at inception or no longer subsisting at the time of her marriage.

In the case of *Cole v. Cole* (153 Ill., 585), it was held that the burden of proof in establishing the validity of a second marriage, shown to have been celebrated while a former husband or wife was living and undivorced, is upon the party alleging the validity of such second marriage.

As already stated, the evidence herein fails to establish the invalidity of the soldier's marriage to Caroline Perkins, or that it was dissolved at the time of his marriage to claimant; and the latter marriage must, therefore, be held to have been void.

Rejection of claims is affirmed accordingly.

SERVICE-CIVILIAN EMPLOYEE-PILOT.

JOHN H. MEEKER.

1. Service as pilot does not bring a claimant within the class of persons entitled to pension under the provisions of section 2 of the act of June 27, 1890.
 2. The words "all persons" in said section are limited by the context to those persons "who served ninety days or more in the military or naval service of the United States during the late war of the rebellion and who have been honorably discharged therefrom," and do not include a person who served in the capacity of a civilian employee or nonenlisted person.
- See cases of *Angelina Coney* (7 P. D., 390); *Anna M. Whalan* (9 P. D., 346); *John Laughlin* (*ibid.*, 466); *Henry N. Haynie* (*ibid.*, 304).

Assistant Secretary Webster Davis to the Commissioner of Pensions, April 25, 1899.

John H. Meeker, late first-class pilot, U. S. S. *Clara Dolsen*, *Great Western*, *Oriole*, *Argosy*, and *Tempest*, by his attorney, on September 24, 1898, filed a motion for reconsideration of departmental decision of May 7, 1898, affirming the Bureau action of October 2, 1895, dropping his name from the rolls on the ground that he was a civilian employee of the Navy Department, not enlisted or mustered into the United States military or naval service, and holding that his pension was erroneously allowed.

It is contended, in brief, that this case should be admitted under the decision in the case of Elizabeth, widow of Samuel S. Brooks, second assistant engineer U. S. S. *Carondelet*, Western Flotilla, U. S. N. (Docket No. 35177), decided January 15, 1898 (265 L. B., 244); that under said decision and the equities in this case claimant should be held entitled to pension under section 2 of the act of June 27, 1890.

A reference to that case shows that the decision was based upon the fact that the evidence fairly established that Brooks was an enlisted man, and not upon the ground that he was a civilian employee.

As was said in that decision, after stating the services performed by Brooks as second assistant engineer—

It is hardly reasonable to believe that the important office of second assistant engineer on the *Carondelet* from the battle of Fort Henry to the naval battle near Memphis would have been intrusted to a civilian or mere Government employee, and the mere fact that the officers and men of these gunboats were paid by the Quartermaster's Department of the Army, instead of the Navy, should not outweigh the testimony of his two brother officers, who testify to his enlistment in the service and his honorable discharge therefrom. This is not a case of adverse record, but rather a case of lost or defective record. There can be but little doubt that claimant's husband served, as alleged, from date of enlistment to date of discharge on board the *Carondelet*, as alleged.

See pages 256 and 257 of said decision (L. B., No. 265).

In the case under consideration claimant does not contend that he ever enlisted, but contends that he was under strict naval orders, was uniformed and drew his pay as a naval officer.

As stated in the former departmental decision in this case—

The Navy Department has no record of the enlistment or service of this appellant during the war of the rebellion. The Fourth Auditor of the Treasury Department reports that the records of his office show that the appellant was employed as a first-class pilot and served as such on board the gunboats *Oriole* and *Tempest* from March 1, 1865, to October 29, 1865. There appears to be no controversy in this case relative to the nature and character of the appellant's service during the war of the rebellion. He states, himself, that he was employed as a pilot by the officer in command of the gunboat and naval flotilla on the Mississippi River and its branches, and served as such on the vessels named in the record and others connected with said flotilla. He does not contend that he ever enlisted or was mustered in the naval service of the United States, but it is contended in this appeal that, inasmuch as he was paid as a naval officer, was under the orders of naval officers, and required to obey and conform to the naval regulations, wore a uniform, and served on war vessels while actively engaged in warlike naval operations, he was in the naval service, and as such was entitled to pension under the provisions of section 2, act of June 27, 1890.

The pensionable status, under the provisions of said section, of persons who rendered during the war of the rebellion service identical with or similar to that of the appellant, has frequently been considered and passed upon by this Department. Express provision is made by the second subdivision of section 4693, Revised Statutes, "for pensioning any master serving on a gunboat, or any pilot, engineer, sailor, or other person not regularly mustered, serving upon any gunboat or war vessel of the United States, disabled by any wound or injury received, or otherwise incapacitated, while in the line of duty, for procuring his subsistence by manual labor," but the very fact that this separate and special provision was made for such persons is conclusive that otherwise they would not be pensionable, even for disability incurred

in service and line of duty, under the general provisions for enlisted men contained in the first subdivision of said section. The provisions of section 2, act of June 27, 1890, apply only to persons who were regularly and legally enlisted and mustered into the military and naval service of the United States, and who served therein for ninety days or more during the war of the rebellion, and the disability which is pensionable thereunder need not be of service origin. In this case it is not claimed by the appellant that his incapacity to perform manual labor, for which he was formerly erroneously pensioned, was due to his service as a pilot in the Navy.

In the case of Andrew J. Shannon (7 P. D., 64) it was held by this Department:

"That none of the classes of persons for whom special provision is made by the second, third, fourth, and fifth subdivisions of section 4693, Revised Statutes, can be considered as having been regularly or legally in the military or naval service of the United States, or included within the terms of the second section of the act of June 27, 1890, or pensionable thereunder."

In the case of Susannah, widow of Francis Mackey (8 P. D., 535), it was also expressly held that "a pilot serving on a vessel of the Navy is not an officer or enlisted man, but merely an employee for the time being. He is not entitled to pension under the second section of the act of June 27, 1890."

In numerous other decisions the ruling has been announced that only officers and enlisted men in the military or naval service were included within the provisions and entitled to the benefits of section 2, act of June 27, 1890.

This motion was considered in part, January 26, 1899, when the papers were returned for a further report of the Navy Department. Under date of February 18, 1899, the Auditor for the Navy Department reported as follows:

John Meeker was appointed February 2, 1864, and served as first-class pilot on the *Clara Dolsen* to May 31, 1864; on the *Great Western* to February 28, 1865; on the *Oriole* to July 31, 1865; on the *Argosy* to August 11, 1865; and on the *Tempest* to October 29, 1865, when he was discharged. There are no rolls of the *Volunteer* or the *Fairy* on file in this office covering the dates specified by claimant. The accounts of those who served on these small vessels or tugs from January, 1864, to March, 1865, appear to have been kept on the *Clara Dolsen* and *Great Western*, the receiving ships at Cairo, Ill.

I am of the opinion that the service of claimant was simply that of a pilot as a civilian employee, and that he was never enlisted, mustered in, or commissioned in the naval or military service.

Service as pilot does not bring a claimant within the class of persons entitled to pension under the provisions of section 2 of the act of June 27, 1890.

The words "all persons" in said section are limited by the context to those persons—

who served ninety days or more in the military or naval service of the United States during the late war of the rebellion and who have been honorably discharged therefrom—

and do not include a person who served in the capacity of a civilian employee or nonenlisted person.

See cases of Angelina Coney (7 P. D., 390); Anna M. Whalan (9 P. D., 346); John Laughlin (*ibid.*, 466), and Henry N. Haynie (*ibid.*, 304).

The motion for reconsideration is accordingly overruled, and the in the case are herewith returned.

RATING—PRACTICE—COMBINING RATINGS.

MARK DAVIS.

Pensioner was receiving a rating of seventeen-eighteenths for neuralgia and slight deafness of both ears, result of catarrh, said rating being made up of two-eightheenths for the first-named disability and fifteen-thirtieths (the schedule rate at time of allowance) for the deafness in that degree. Afterwards, when rating of four-eightheenths was allowed for additional disability from chronic diarrhea and piles, the total rating was continued at seventeen-eighteenths, because the ratings could not be combined to make twenty-one-eighteenths, a rate unknown to the law. Then again, the schedule rate for slight deafness of both ears has been reduced to six-thirtieths. This was recommended in the last certificate of examination, together with six-eightheenths for piles and disease of rectum, result of diarrhea, and six-eightheenths for pains in stomach, chest, and head, result of neuralgia. Thus, the combined rates making eighteen-eighteenths, kept the total pension at the former rate of seventeen-eighteenths per month.

The ratings named could not be combined to make the third-grade rate, or \$24 per month, even if they would amount to so much, and as they do not altogether, and considered as a whole, produce a degree of incapacity to perform manual labor equivalent to the loss of a hand or foot, pensioner is not entitled to said third-grade rate.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
April 26, 1899.*

The appeal of Mark Davis, late of Company D, Forty-seventh Indiana Infantry, entered May 20, 1898, is from the action of the Bureau of April 21, 1898, refusing to increase the amount of his pension, although admitting the existence of additional disabilities. The history of the case and the material facts touching the issue made by the appeal are correctly stated in the following report of the medical referee:

Pension was originally granted this appellant at two-eightheenths, commencing March 29, 1884, date of filing, on account of disability resulting from neuralgia. On September 21, 1891, he was allowed additional pension, beginning same date, for catarrh and resulting slight deafness of both ears, seventeen-thirtieths being the rate fixed, \$2 for the catarrh and \$15 for the deafness, combined rate not to exceed seventeen-eighteenths. On April 14, 1897, he filed a claim for increase and on account of additional or new disabilities, chronic diarrhea and resulting piles.

On April 21, 1898, the claim for increase was rejected and a rate of four-eightheenths allowed for the new disabilities, combined rate not to exceed seventeen-eighteenths.

The pensioner, through his attorney, has appealed from this last action, contending, in effect, that inasmuch as he was already receiving \$17 per month on account of neuralgia, catarrh, and slight deafness of both ears, the admission of the new cause of disability should operate to increase the rate.

Certificate of medical examination made July 28, 1897, on which the rate was fixed shows the following conditions in reference to the causes for which pension was granted: " * * * height, 5 feet 9 inches; weight, 140 pounds; age, 52 years. Nutrition poor; tongue flabby, brown-coated. Throat congested and coated with catarrhal mucus. * * * The posterior nares highly inflamed and mucous membranes thickened. External meati inflamed. Tympanum right ear light gray, left ear dark with inflamed edges of both tympani. He does (not) hear ordinary conversation at 6 feet; more severe in right than in left; cause, catarrh. Rate on slight

deafness of both ears, six-thirtieths. Stomach, liver, and spleen tender on pressure. Liver extends 1 inch below ribs. The bowels are tender also on pressure. Claimant says diarrhea comes on about twice a month followed by constipation. Sometimes it comes once a week. There are four external pile tumors, one-fourth inch in diameter, three of them inflamed, and two internal tumors inflamed. Also anterior and posterior walls very much inflamed; cause, chronic diarrhea. Rate, piles and disease of rectum, six-eightieths.

"Claimant complains of very severe pains in the stomach, chest, and head a great deal of the time and sometimes in the limbs. We attribute the cause of neuralgia to disease of stomach, and perhaps rheumatism also. * * *"

At the date of admission of catarrh and resulting deafness the schedule rate for said degree of deafness was fifteen-thirtieths. It is now six-thirtieths. The rate of seventeen-eightieths was made almost wholly by the schedule rate for the degree of deafness shown. Deafness can not be considered a factor in making a grade rate, and as the degree of disability resulting from neuralgia, catarrh, chronic diarrhea, and piles is not shown to be equivalent to the loss of a hand or a foot for the purposes of manual labor, the next higher rate of third grade was not warranted. Action is adhered to.

It will be observed that the certificate of examination quoted in the foregoing report describes only slight deafness of both ears as a result of catarrh, and recommends a rating of six-thirtieths, or \$6 per month, which is the schedule rate for that disability. Said certificate also recommends a rating of six-eightieths, or \$6 per month, for piles and disease of rectum, results of chronic diarrhea, which appears to cover the amount of disability described. And for the pain in the stomach, chest, and head, caused by neuralgia, the certificate also recommends a rating of six-eightieths, or \$6 per month (omitted in the report). Now, if all these ratings were added they would make only eighteen-eightieths, or \$18 per month, but as the law—act of March 3, 1883—abolished the rate of \$18 per month except for purposes of division or for compounding separate disabilities, so as to allow the full amount which they, separately considered, would aggregate, it is plain that the combined disabilities herein mentioned could only be rated at a fraction of \$18 per month. This has been done and the highest fraction, seventeen-eightieths, has been allowed.

The medical referee states that "deafness can not be considered as a factor in making a grade rate." This refers to the fact that a specific rating of \$30, total, or fractions thereof for degrees less than total, has been provided for deafness. So when any degree of deafness has been rated under this schedule, and at a fraction of the total rate of \$30 per month, such rating would not be added to other rates for other disabilities to make a grade rate. This may be illustrated thus: The schedule rate for total deafness of one ear and slight of the other is \$20 per month. Should this rating be allowed in any case, and the claimant was shown to be also entitled to a rating of \$4 per month for chronic diarrhea and piles (as in the present case), the two rates of \$20 and \$4 per month could not be added to make a rating of \$24 a month. This last sum is the amount of the third-grade rate, which can be given only when it is shown that a claimant has been so disabled (by any or all

disabilities combined) as to render his incapacity to perform manual labor equivalent to the loss of a hand or foot.

In the case stated the rating for the degree of deafness would be allowed, and the disability from diarrhea and piles would be ignored, unless the disabilities, taken altogether, without reference to the specific schedule rate for the deafness and without combining the rates, should be considered equivalent to the loss of a hand or foot. Then the third-grade rating, or \$24 per month, would be allowed. Thus it will be understood that while the separate rating for deafness and for each other disability may be combined to make a total rate up to seventeen-eighteenths, they may not be combined to make any higher rating. So it was in this case; the rating of two-eighteenths for neuralgia was added to the rating of fifteen-thirtieths (then the schedule rate) for slight deafness of both ears, which made the seventeen-eighteenths first allowed. Afterwards a rating of four-eighteenths was allowed for diarrhea and piles. This could not be added to the other rate to make twenty-one-eighteenths, as no such rate is known to the law. As stated in the medical report, the schedule rate for slight deafness of both ears is now six-thirtieths, instead of fifteen-thirtieths. If when the four-eighteenths for diarrhea and piles were added the rates had been combined on the basis of two-eighteenths for neuralgia, six-thirtieths for deafness, and four eighteenths for diarrhea and piles, the total pension would have been reduced to twelve-eighteenths. But, as seen, the certificate of examination recommended a rating of \$6 per month for each, thus keeping the total pension up to seventeen-eighteenths, as before.

In further explanation of this matter it may be remarked that the law provides but three rates which are divisible. The rates provided for total disability in section 4695, Revised Statutes, may be divided into halves or quarters of the full amount named, as where a private is allowed \$8 per month for total disability a less degree may be rated at one-fourth, \$2; one-half, \$4, or three-fourths, \$6, per month. Then the \$18 per month rate may be divided as before pointed out, and the \$30 per month provided for total deafness may be divided for lesser degrees of the same. Grade rates, as \$24 per month, third grade; \$30 per month, second grade; \$50 per month, intermediate grade, and \$72 per month, first grade; and specific rates for fixed and permanent disabilities, as the loss of a hand or a foot, \$30 per month; the loss of a hand and a foot, \$36 per month; the loss of both feet, \$72 per month; the loss of both hands, \$100 per month, are not divisible.

But if the effect of appellant's disabilities for which he is admitted to be entitled to pension were such that his incapacity to perform manual labor was equivalent to the loss of a hand or a foot, he would be entitled to \$24 per month, or the third-grade rate. This does not appear to be the case from the description given in the certificate quoted. There are some general statements of witnesses indicating

that he is in a very bad condition, especially from neuralgia and diarrhea; but there is no detailed description of the symptoms and extent of these, and such statements are not borne out by the certificate referred to. So that there is no substantial basis upon which to allow the said rating of \$24 per month, and the rating of \$17 per month appears to have been correctly allowed. That action is accordingly affirmed.

SERVICE—MUSTER OUT TO ACCEPT NEW COMMISSION.

HELEN A. M. TAYLOR (WIDOW).

The claimant's husband having been discharged from the service as surgeon of the Second Ohio Cavalry, for the purpose of enabling him to accept an appointment from the governor of Ohio as surgeon of the Eighty-ninth Ohio Infantry, and having been drowned while on his way to join the latter regiment and before being mustered in, it is held that he was not in the military service of the United States at the time of his death and that his widow is not entitled to pension under existing laws.

Assistant Secretary Webster Davis to the Commissioner of Pensions, May 8, 1899.

The rejection of this claim was, on appeal, affirmed by the Department on July 28, 1897. A motion for reconsideration was filed November 10, 1898. The facts in the case were stated in the former decision, as follows:

The official military record in the War Department of the deceased officer's army service shows that he was enrolled and mustered in as surgeon of the Second Regiment Ohio Volunteer Cavalry on August 27, 1861, and served in that capacity until May 7, 1863, when he was mustered out of the service "to enable him to accept appointment as surgeon in the Eighty-ninth Ohio Volunteer Infantry, and to enable him to be mustered in as such by the A. C. M. to whom said regiment is assigned."

Said muster out of service as surgeon of Second Ohio Volunteer Cavalry was made pursuant to the following communication from the War Department:

WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE,
Washington, D. C., April 18, 1863.

SIR: I have the honor to acknowledge the receipt of your letter of the 4th instant asking that Surg. Alfred Taylor, Second Ohio Cavalry, may be transferred to the Eighty-ninth Regiment Volunteer Infantry. In reply I am directed to inform you that under the rules of the Department the transfer can not be allowed. No objection, however, will be made to this officer being appointed as surgeon of the Eighty-ninth Volunteer Infantry. He can then be mustered into the new position.

I am, sir, very respectfully, your obedient servant,

THOMAS M. VINCENT,
Assistant Adjutant-General.

His Excellency the GOVERNOR OF OHIO,
Columbus, Ohio.

A true copy of the original on file in adjutant-general's office, Columbus, Ohio.

ROBERT HUME,
Adjutant-General, Ohio.

A true copy:

R. B. HULL,

Captain, Eighteenth Infantry, Assistant Commissary of Musters.

It is shown by the evidence in this case that after the officer was mustered out as aforesaid, and while he was on his way to be mustered in as surgeon of the Eighty-ninth Ohio Volunteer Infantry, he fell from a steamboat in the Ohio River and was drowned on May 23, 1863.

The War Department held, on December 8, 1866, in response to an inquiry from your Bureau, as follows:

"The late Alfred Taylor can not be recognized as in the service as surgeon, Eighty-ninth Ohio Volunteers, at the date (May 23, 1863) of his alleged accidental death, while on his way to join that regiment under a commission issued to him as surgeon of the same.

"THOMAS M. VINCENT,
"Assistant Adjutant-General."

And subsequently, on May 18, 1897, the War Department reported on this case as follows:

"The name Alfred Taylor has not been found on the rolls of Eighty-ninth Ohio Infantry. In the absence of a record or of testimony showing that this officer joined the Eighty-ninth Ohio Volunteers and entered upon duty as surgeon of that regiment, recognition as such can not be extended to him under existing law."

The Department held that "the question whether or not the deceased officer was, under the circumstances shown by the record, in the military service of the United States at the time he met his death by drowning, is one which the War Department has exclusive jurisdiction to decide and its decision is conclusive on this point."

It is contended in support of the pending motion that this Department should not be guided by the strict construction placed upon the question at issue by the War Department, but that it has authority to determine and should determine that the officer was in the military service of the United States at the time of his death.

Conceding, for the sake of the argument, that this Department is not bound to accept the decision of the War Department upon the question at issue, upon what ground could it be held that the claimant's husband was in the military service of the United States at the time of his death? He was formally discharged from said service on May 7, 1863, as is shown by the following certificate on his muster-out roll:

I certify, on honor, that I have, at Cincinnati, Ohio, on this 7th day of May, 1863, carefully examined this roll, and, as far as practicable, caused the allowances, stoppages, and remarks to be justly and properly stated, and mustered the said Alfred Taylor for discharge; and he is hereby honorably discharged from the service of the United States.

R. B. HULL,
Captain, Eighteenth Infantry, U. S. A., Mustering Officer.

Muster { Date: May 7, 1863.
 Station: Cincinnati, Ohio.

No matter what the purpose of this discharge may have been, it was, in form and in fact, an absolute, unconditional release from the military service of the United States, and I think no one will venture to maintain that if, after receiving it, the officer had concluded not to accept the appointment as surgeon of the Eighty-ninth Infantry, he could have been still held to service against his will by the military authorities.

If he was in the service at the time of his death he must have been either surgeon of the Second Ohio Cavalry or surgeon of the Eighty-

ninth Ohio Infantry. It is clear from what has been already said that he was not at that time surgeon of the Second Ohio Cavalry. Was he surgeon of the Eighty-ninth Infantry? It is true that he held an appointment to that position from the governor of Ohio, but the governor of Ohio could not put him into the service of the United States. It was necessary for him to be formally accepted into such service by a duly authorized agent of the United States Government, such formal acceptance constituting what is known as "muster in." Applying the same test as in the other case, suppose he had willfully declined to be mustered and had gone home, would he have been guilty of any offense cognizable by a court-martial? I think not. His status for the time being was simply that of a civilian who purposed to reenter the service, but had not reentered it at the time of his death.

It is argued that his case is covered by paragraph 1 of section 4693 of the Revised Statutes, which provides that among the persons entitled as beneficiaries of the pension laws shall be:

Any officer of the Army, including regulars, volunteers, and militia * * * or any enlisted man, however employed, in the military or naval service of the United States, whether regularly mustered or not, disabled by reason of any wound or injury received, or disease contracted, while in the service of the United States and in the line of duty.

It is believed that the words "whether regularly mustered or not" were intended to apply to the case of an officer or enlisted man who, before formal acceptance into the Army by a mustering officer, was rendering actual military service, and in the performance of such service was wounded or injured or contracted disease. In the case now under consideration the officer was not rendering any military service at the time he was drowned. He was merely traveling toward the regiment to which he had been appointed by the governor of the State with the intention of offering his services.

In the case of William P. Payne which was before the Department on appeal on December 28, 1892, the evidence showed that the claimant with about thirty-five other loyal citizens of North Carolina, under the leadership of a comrade named Simonds, who was acting in the quasi capacity of a recruiting officer, started to make their way to the Union army in Tennessee, with a view to enlisting therein, and that while crossing the mountains they were attacked by a squad of Confederates and the claimant was severely wounded and was unable to proceed farther. Most of his comrades who escaped did enlist as soon as they reached the Union lines, and their enlistment was dated back to the day on which Simonds took down their names. Payne's application for pension having been rejected an appeal was taken, in deciding which Assistant Secretary Bussey said:

From the evidence it is fair to assume that the claimant did start from home with a purpose to enlist, as did his comrades, among whom was a brother, who promptly entered the service. But as a matter of fact and of law, this claimant had the misfortune to be wounded before he had the opportunity to become an enlisted or a

mustered soldier. It is true that had he succeeded in reaching the Union lines and been mustered in, to date back, as was the case with his comrades, the case would present a different aspect legally. But in fact he did not reach the Army at that time, was never recorded in the command, and was not enlisted or mustered in. The claimant naturally thinks it a hardship that the fact of receiving this severe wound while in the pursuit of a loyal purpose should be the very means of placing him beyond the possibility of having a legal pensionable status. But it is clear without argument, that such is the hard truth.

The case now under consideration presents substantially the same state of facts. The officer was proceeding toward the station of the Eighty-ninth Ohio Infantry with the purpose of being mustered in and entering upon the performance of his duties as regimental surgeon; but, in fact, he never reached the regiment and never did any duty in connection therewith.

I am of the opinion that the case is one for which the general law makes no provision and that the widow can obtain relief only by a special act. The motion is, therefore, overruled.

ATTORNEYSHIP—DEATH OF CLIENT.

MARGARET HAWKINS (WIDOW).

Where a claimant dies prior to the final rejection of pension claim by the Bureau of Pensions the authority of the attorney of claimant is terminated; and without further authority from those succeeding to the right, in whole or in part, of the deceased claimant, the attorney has no right, power, or authority to appeal from such Bureau action. See cases of Phineas D. Judson (8 P. D., 185); *Americus Mayo* (7 P. D., 531); *James Keating* (Ibid., 280); and *J. Ambler Smith and Samuel H. Lewis* (Ibid., 69).

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
May 12, 1899.*

On September 8 and December 4, 1897, the attorney of Margaret, widow of William Hawkins, late private of Company B, One hundred and sixteenth United States Colored Volunteer Infantry, filed appeals from Bureau action of March 18, 1882, rejecting widow's claim No. 145041, filed April 3, 1876, under section 4705, Revised Statutes, on the ground that soldier's fatal disease was due to injury received prior to his enlistment.

It appears from the face brief that the case was subsequently reopened and specially examined, and again finally rejected October 8, 1898, on the ground that soldier died in the service from chronic diarrhea, contracted prior to enlistment, as reported by the War Department under date of May 15 and October 16, 1897.

It further appears that evidence taken on special examination shows claimant died August 24, 1897, and expenses of her burial were paid out of life insurance left by her.

There is no claim filed for reimbursement.

Where a claimant dies prior to the final rejection of pension claim by the Bureau of Pensions the authority of the attorney of claimant is terminated; and without further authority from those succeeding to the right, in whole or in part, of the deceased claimant, the attorney has no right, power, or authority to appeal from such Bureau action. See cases of Phineas D. Judson (8 P. D., 185); Americus Mayo (7 P. D., 531); James Keating (Ibid., 280); and J. Ambler Smith and Samuel H. Lewis (Ibid., 69).

Said appeals having been filed subsequent to claimant's death, and no new power of attorney having been filed by said attorney from those, if any exist, authorized to further prosecute said claim, they are accordingly dismissed.

The papers in the case are herewith returned.

MARRIAGE—INSANITY—IMPEDIMENT.

MARY J. STORMS (WIDOW).

As soldier was incapable of entering into a marriage relation by reason of insanity, the claimant's marriage to him is void, and therefore action rejecting her claims for pension upon the ground indicated was proper.

Assistant Secretary Webster Davis to the Commissioner of Pensions, May 12, 1899.

On January 27, 1898, an appeal was entered from the action of your Bureau in the claims for pension, under the general law and act of June 27, 1890, of Mary J. Storms, as widow of William J. Storms, Company A, Thirteenth Michigan Volunteer Infantry.

The original declarations were filed August 24, 1894; the claims were rejected January 23, 1895, upon the ground that appellant is not the widow of the soldier. On appeal said action was affirmed May 18, 1896 (7 P. D., 571). Subsequently the claims were reopened, additional evidence filed, and a special examination held, whereupon the former action of rejection was adhered to.

The soldier served in Company A, Thirteenth Michigan Volunteer Infantry, and the War Department reports as follows:

Enlisted October 23, 1861; mustered into service as a veteran volunteer 28th January, 1864. * * * On the muster roll for the months of November and December, 1864, he is reported "absent sick at Lookout Mountain since September, 1864." On roll for January and February, 1865 (report Adjutant-General's Office), discharged May 5, 1865, in consequence of insanity.

The records of the Surgeon-General's Office (report dated October 3, 1866) show that soldier was admitted to the hospital at Lookout Mountain, Tennessee, October 2, 1864; diagnosis, "insanity."

On January 17, 1866, he filed a declaration for pension under the general law on account of insanity, result of typhoid fever. March 27,

1867, pension was allowed from May 5, 1865, date of discharge, at \$8 per month, on account of "insanity." The rate was increased to \$12 per month from April 17, 1878, and to \$30 from June 18, 1884.

He was formally married to this appellant May 1, 1881, and died July 7, 1894. He was adjudged a lunatic June 4, 1866, by the county court of Erie County, State of New York, and his mother was appointed his guardian.

August 18, 1885, the county court of Allegan County, Mich., appointed William H. Burchett guardian of the estate of William J. Storins, "an imbecile," upon the petition of his mother, who had tendered her resignation as guardian.

The claimant's marriage to the soldier was held to be void upon the ground that the soldier was incompetent to contract a marriage relation.

Evidence is adduced to show that soldier was harmless, addicted to excessive alcoholism; a plasterer by trade, worked at times, and spent his earnings for drink. The claimant testified that soldier was all right, except that his "tongue would not go off when he wanted it to;" that he could think coherently, but easily became excited, and would forget what he had to say. She states that soldier was at times employed at his trade, made contracts, and collected his earnings and spent them. This, in substance, is the testimony of quite all the witnesses. She states that soldier plastered her house; that he was very slow—"thought he never would get through"—and that it was then she became acquainted with him. The appellant owned a small farm, which she sold subsequent to her marriage. A small house was erected for soldier by his guardian, and she and the soldier lived therein. The guardian used the pension money for the support of soldier and claimant. According to the claimant's statement, soldier lived with her about one-half the time and the other half elsewhere, generally with his mother, who lived near the claimant.

On November 5, 1894, the personal estate of the soldier, amounting to \$195.74, was assigned to the claimant as his widow by order of the county court of Allegan County, Mich.; also the real estate, a house and lot, was assigned to the claimant as widow and to the soldier's mother in equal shares.

The appellant's attorney insists that the aforesaid judgment of the county court determines the question at issue in this case so far as the legality of the marriage of claimant and soldier is concerned.

It is conceded that the said judgment is evidence of its existence and is binding upon all persons having claims against the soldier's estate and upon those who may seek to contest the appellant's right to the property of the soldier assigned to her as his widow. But as the United States is not interested in the soldier's property, it is not apparent what effect that judgment may have in matters in no way connected

with said estate, and the attorney does not explain the connection. The fact that the claimant was named by said court as the widow of the soldier is a fact worthy of consideration, but it has no legal binding effect whatever in matters wholly disconnected with soldier's estate.

The legality of the marriage of the soldier and appellant is not presumed in the latter's claims for pension; that it was presumed by the county court of Allegan County is evident, as its legality was not questioned.

The fact whether the soldier was mentally incapable of entering into a marriage relation is the gist of the ground of rejection in the claims.

A medical examination was held in the soldier's claim in April, 1878. The examining surgeon certified as follows:

This man is an imbecile. The imbecility is caused by typhoid fever, as his mother states; his general appearance is dull and listless. He stares, don't smile, can't remember perfectly, though he remembers the names of his company and regimental officers.

Many of the witnesses were asked whether they thought the claimant was crazy. Their answers, in substance, were that they thought he was of unsound mind, "seemed to have lost his mind," could not relate anything correctly, and then would forget what he had said. Would answer "yes" to question and in a short time would answer "no" to the same question; then again would be unable to collect his thoughts. His guardian states he was void of any judgment; would give ten times the price for an article.

It is noticeable that the evidence in the soldier's claim was directed to show that he was insane—an imbecile—and thereby totally incapacitated for the performance of manual labor; that in the widow's claims the evidence is directed to show he was not insane or an imbecile, but "odd like," "rattled," a drunkard, a spendthrift, incompetent to do business, could work and did work at his trade.

All evidence shows that his condition from day to day was about the same. The record evidence shows that he was considered by his relatives as an imbecile. All the physicians who examined the soldier have certified to his imbecility and described his mental and physical condition such as to convince a person that the soldier was insane. The witnesses who have attempted to describe the condition of his mind as manifested by his conversation state that he could not talk connectedly and soon forgot what he said.

Whether the soldier may properly be termed an imbecile, an idiot, or a lunatic, is immaterial, though appellant's attorney sets a great deal upon the terminology used. He seems to prefer the words "unsound mind;" this expression is descriptive of a lunatic or of an imbecile. The soldier's mental condition was so impaired that he had been adjudged an imbecile and had been pronounced an imbecile by medical men. It has been proven to the satisfaction of the Bureau in soldier's claim that he was insane. In my opinion the evidence shows he was

insane; that he was deprived of his mental faculties to such an extent that he could talk and think but little, and that he soon—in a few hours—would forget what he said or did, and hence was constantly insane in a degree, rendering him incompetent to enter into a valid marriage relation.

At common law the marriage of an insane person is void.

Section 6214, Revised Statutes of Michigan, provides:

No insane person or idiot shall be capable of contracting marriage.

Section 1, chapter 237, vol. 2, Revised Statutes, Michigan (1882), provides:

All marriages * * * solemnized when either of the parties were insane or an idiot, shall, if solemnized within this State, be absolutely void, without any decree of divorce or legal process.

The validity of a marriage contract has been affirmed, notwithstanding a considerable degree of incompetency, when tending to benefit and suitable to the conditions and circumstances of a party whose mind is impaired, and invalidated when shown to have been procured by improper influences and manifestly for the advantage of the other party.

No attempt appears to have been made by soldier's relations to invalidate his marriage. The new relation seemed to please him a part of the time, and as he was somewhat refractory toward those under whose control he was, he was permitted to live unmolested with the claimant when he would, and she, on her part, permitted him to spend his earnings for drink. She knew when she married him that soldier was pensioned on account of insanity, and, from a legal point of view, also knew he was not capable of entering into a legal marriage contract, for otherwise he was sane and not entitled to pension. She had knowledge that the soldier could work but little, was a mental wreck, a confirmed drunkard, and spent what little he did earn for drink; that her only prospect for their support was his pension money, as he could not provide himself with a support.

Any other view would be based on an assumption that the soldier was mentally competent to transact business, and physically capable of performing labor, conditions indirectly disproved in his pension claim. So as pension was paid the soldier on account of disability due to insanity, which has been shown to exist by a high grade of evidence, in a degree characterized as idiocy, payment of pension on account of his services and death can not be continued to the appellant as his widow upon evidence showing that at times he could work, and upon the statement of witnesses that they did not consider the soldier "crazy" or idiotic.

Therefore the action of the Bureau in rejecting the appellant's claims for pension as the widow of the soldier is affirmed.

EVIDENCE—CERTIFICATE OF DISABILITY.

JOHN SCHUBERT (DECEASED).

The statement of the claimant's captain in a certificate of disability, made in the regular discharge of his official duty, as to the origin of the disability for which pension is claimed, is not overcome by his contrary statement made from memory eight or nine years afterwards.

Assistant Secretary Webster Davis to the Commissioner of Pensions, May 12, 1899.

I have considered the appeal filed January 27, 1898, from the action of your Bureau in rejecting the pension claim of John Schubert, now deceased, formerly a soldier in Company C, Fifty-ninth Ohio Infantry. It appears that Schubert was in the service from September 16, 1861, to February 26, 1862, and that on September 18, 1868, he filed a claim for pension on account of rupture alleged to have been incurred during said service, which was rejected in 1871, because a record made at the time of his discharge showed that the rupture existed prior to enlistment. He died on September 17, 1875. His widow filed considerable evidence with a view to having the claim reopened, and in June, 1881, it was reconsidered and again rejected upon the same ground as before. Nothing has been done in the case since then prior to the filing of the appeal. The widow has been granted a pension under the act of June 27, 1890.

The soldier was discharged from service upon a surgeon's certificate of disability containing the following statements:

Said Schubert, when he entered our company, appeared in good health, doing all duties required of him until he arrived at Hazel Green, Ky. (about the first week in November, 1861). At this point his rupture was made worse by causes unknown. The rupture originated six years before he entered the Army. He has not been fit for duty since the 1st of December, 1861.

Station: Columbia, Ky.

Date: February 7, 1862.

LEWIS J. EGBERT, *Commanding Company.*

I certify that I have carefully examined the said John Schubert and find him incapable of performing the duties of a soldier because of inguinal hernia. He says it took place during the march of his company from Mount Sterling, Ky., to Prestonsburg. As I was not with the regiment at the time, I can not say whether it occurred at that time or not.

A. C. MCCHESENEY, *Surgeon.*

Captain Egbert, in November, 1870, made an affidavit stating that while on a march with his company in Kentucky the claimant, in attempting to cross a ditch or ravine on a log, slipped and fell astride of the log and thence into the ditch; that he was taken up and found to be ruptured; that before this occurrence he was declared sound by the mustering officer and exhibited no appearance of being ruptured, and that after the injury he was wholly unfit for service.

On July 1, 1871, he made another affidavit, stating that if it appeared by his certificate of disability that John Schubert was ruptured before enlistment it was a mistake and must have been made in copying; that he did not know the said John Schubert prior to his enlistment, and that the latter was familiarly known to the regiment as "Old Iron Dutch Horse" by reason of his robust and vigorous health up to the time of his injury.

A letter addressed to Captain Egbert by the Commissioner of Pensions, in 1892, elicited a reply from his daughter stating that he had been dead over four years. It is contended in the appeal that the statement in his certificate of disability is nullified by his subsequent affidavits, and that as there is no other evidence that the soldier was ruptured before enlistment, but much evidence tending to show that he was sound and that he incurred his rupture in the service and line of duty as alleged, the claim should be allowed.

The document on which the rejection of the claim was based is the original certificate of disability (not a copy), and that portion of it signed by Captain Egbert is in his own handwriting. He made no mention therein of any injury such as was subsequently alleged, but stated positively that the rupture originated six years before enlistment and that it had been made worse in the service "by causes unknown." This record was made in the ordinary course of his official duty, and there is no reason to believe that he had at that time any motive for misrepresenting the facts. If it is true that he did not know the soldier before enlistment, it is reasonable to infer that he based his statement relative to the origin of the rupture upon information derived from those who did know him or (which is most likely) from the soldier himself. If he had had personal knowledge of the soldier's being ruptured or badly injured by falling astride of a log, it is altogether unlikely that he would have made such a record as he did. The fact that he made statements in conflict therewith, eight or nine years afterwards, can not be held to offset an official record made when the events of the service were fresh in his memory. It has been repeatedly and almost uniformly held by the Department that a statement in the certificate for discharge that the disability on account of which the soldier was discharged existed prior to enlistment not only outweighs the presumption of prior soundness, or of the claimant's allegation thereof, but satisfactorily establishes the fact until the same is clearly disproved. (Isaac Williamson, 1 P. D., 7; Alonzo F. Wescott, *ibid.*, 316; Daniel Bidlake, 3 P. D., 27; Hilliard Preston, 8 P. D., 374.)

It has also been held that a surgeon's statement in a certificate of disability, made in the regular discharge of his official duty, as to the origin of a disability must be accepted, rather than his certificate made from memory long after the soldier's discharge. (David K. Mitchell, 1 P. D., 62; see also James Boyle, *ibid.*, 149, and Henry Halstead, 2 P. D., 221.)

The testimony filed in this case to show that the soldier was free from rupture before enlistment is by no means convincing. It consists of the affidavits of persons who knew him more or less intimately, and who think he was not ruptured because he did a good deal of hard work and never complained to them of a rupture. None of them ever examined him or had their attention particularly called to his bodily condition with respect to rupture. The soldier swore, in 1872, that he was not examined by any surgeon or physician at the time of muster-in.

The testimony of comrades as to the appearance of the hernia immediately after the injury which is alleged to have caused it is entirely consistent with the view that it was an old hernia which the injury merely aggravated.

It is proper to add that one of the witnesses who had testified to soundness at enlistment afterwards wrote to the Pension Bureau that while he had judged from the soldier's appearance that he was sound, he had, since testifying, heard that he was ruptured at the time he enlisted.

For reasons above stated, after careful consideration, I am of the opinion that the claim was properly rejected. The rejection is accordingly affirmed.

FEE-FEE AGREEMENTS—TWO CLAIMS AND TWO FEES.

DEMMON S. DECKER (CLAIMANT).

MILO B. STEVENS & CO. (ATTORNEYS).

Attorneys are not bound by fee agreements limited in their application to a claim for increase on account of a new disability to prosecute a claim for straight increase.

As the fee agreements filed were expressly limited in their application to the claim for additional pension, the appellants are entitled to the fee stipulated in said agreements for securing the allowance of additional pension, and also to the fee provided by law for securing the allowance of straight increase.

Assistant Secretary Webster Davis to the Commissioner of Pensions, May 15, 1899.

Milo B. Stevens & Co., of Washington, D. C., March 18, 1898, appealed from the action of the Bureau in the matter of fee on the issue of August 2, 1898, in the claim for pension under the general law, of Demmon S. Decker, Company I, Fifty-sixth New York Volunteer Infantry.

The soldier was in receipt of pension under the general law at the rate of \$7.50 per month, on account of chronic diarrhea, when, on February 10, 1893, in his behalf, the appellants filed a claim for straight increase. They also filed in his behalf, August 23, 1893, a claim for additional pension on account of disability due to disease of stomach and indigestion. On February 18, 1895, they filed fee agreements stip-

ulating for the allowance of fee of \$25. On May 23, 1896, the claim for straight increase was allowed and appellants were paid a fee of \$2.

On August 2, 1898, certificate issued to allow additional pension on account of disease of stomach. On said issue appellants were certified a fee of \$25, less \$2, the amount certified to them on May 23, 1896, in the claim for straight increase.

The appellants' contention in substance is that they are entitled to a fee of \$25 for securing the allowance of additional pension, and also a fee for securing straight increase.

As noted, the claim for straight increase filed by appellants February 10, 1893, was pending when on February 18, 1895, they filed fee agreements.

Said fee agreements read as follows:

Whereas I, Demmon S. Decker, late a second lieutenant in Company I of the Fifty-sixth Regiment of New York Volunteers, war of 1861, having made application for additional pension, on account of new disability, under the laws of the United States, now this agreement witnesseth, that for and in consideration of the services done and to be done in the premises I hereby agree to allow my attorneys, Milo B. Stevens & Co., of Washington, D. C., the fee of \$25, which shall include all amounts paid and to be paid in the furtherance of said claim; * * *

The act of July 4, 1884, authorizes the filing of fee agreements for \$25 in "claims for increase on account of a new disability." It is further provided that—

No greater fee than \$10 shall be demanded, received, or allowed * * * in any claim for increase of pension on account of increase of disability for which the pension had been allowed.

By act approved March 3, 1891, the allowance of a fee in excess of \$2 in straight increase claims is prohibited.

There is no provision of law authorizing the recognition of fee agreements in claims for straight increase, and by the terms of the act of July 4, 1884, section 4, the recognition of fee agreements in straight increase claims is prohibited by implication.

Therefore the rule is that fee agreements shall be recognized when filed in claims for additional pension and the fee therein stipulated shall be certified in accordance with conditions set forth in the agreements. If by their terms fee agreements are limited in their application to "a claim for increase of pension on account of a new disability," such agreements have not been construed as including a claim for straight increase pending at the time they were filed.

In the case of Amos Silvis, Certificate No. 293994 (4 F. P. L. Bk., 6), upon appeal entered by Milo B. Stevens & Co., the facts were as follows:

Appellants in behalf of the soldier, February 15, 1888, filed a claim for straight increase, and on October 1, 1888, in his behalf they filed a claim for increase of pension on account of a new disability—chronic rheumatism. On the date of filing the last declaration, or later, and during the period when both claims were pending in the Bureau, they filed fee agreements for \$25.

On November 1, 1889, certificate issued to allow increase on account of the pensioned disability and also to allow additional pension on account of rheumatism. On said issue a fee of \$25 was paid Milo B. Stevens & Co. under the fee agreements filed. Said attorneys, upon appeal, contended that the articles of agreement related only to the claim on account of new disability, and, therefore, they were entitled to an additional fee of \$10 in the claim for increase on account of pensioned disability, as provided by law.

The Department, January 9, 1890, in deciding the question at issue, said:

The articles of agreement set forth distinctly that the fee of \$25 was to be paid for the services of the appellant in furtherance of the claim on account of the new disability—chronic rheumatism. The claim for increase on account of increase of pensioned disability was a distinct and separate claim, and was prosecuted to a successful issue. The appellants were the duly appointed attorneys therein. They are, therefore, entitled to an additional fee in that claim. You will please, therefore, direct that the fee in said claim be deducted from the current pension and paid to the appellants.

On February 26, 1898, the Department, in the case of Jacob C. Spires, Certificate No. 207096 (30 F., P. L. Bk., 480), held, upon a like statement of facts, that—

Attorneys are not bound by fee agreements limited in their application to a claim for increase on account of a new disability to prosecute a claim for straight increase.

In strict conformity with the above rule, it is held that when the fee agreements are not expressly limited in their application to a claim for increase on account of new disability that they apply to a claim for increase on account of pensioned disability pending at the time said agreements are filed, and therefore an attorney under such agreements is entitled to but one fee for securing the allowance of both claims.

This doctrine is based upon the fact that fee agreements general, in their application, in terms include all applications for increase pending in behalf of a pensioner and the further presumption that the attorney has expressly agreed to prosecute both claims for one fee, that stipulated in said agreements. (See case of Peter F. White, 2 P. D., 399.)

In thus construing fee agreements not limited to any specific claim for increase the Department in affirming the practice has been careful to call attention to the fact that only in the absence of an express limitation of the fee agreements to a claim for increase on account of additional pension would they be held as applying to claims for straight increase pending at the time fee agreements were filed.

So in the case of Davis S. Snow, Certificate No. 289312 (1 Fee P. L. Bk., 305), decided September 5, 1888, the appellants were denied recognition in a claim for straight increase filed subsequent to fee agreements general in their application on file in a pending claim for additional pension. It was also stated that were appellants authorized to prosecute the claim for straight increase they would under the conditions be entitled to a fee for securing its allowance, and also to the full fee stipulated in the fee

agreements, upon securing the allowance of increase on account in new disability.

In the case of Jacob S. Jones (7 P. D., 73), decided November 24, 1893, attention was called to the fact that—

there is nothing in the articles of agreement filed by appellant indicating that claimant intended to pay any sum in excess of \$25,

as stipulated therein, and accordingly it was held that the fee agreements applied to the claim for straight increase and additional pension. This was in conformity with the rule in *White's Case*, *supra*. In Jones's case the claimant testified that his intention was to pay appellants a fee in the straight increase claim in addition to the fee stipulated in the fee agreements. It was held that the terms of the fee agreements could not be varied by extrinsic evidence.

In the case of Isaac Johnson (7 P. D., 105) the Department set forth that "there is nothing in said articles indicating that they applied to the claim for new disabilities only," and therefore held that the fee agreements applied to the claim for additional pension and for straight increase.

In the decision of the Department in the case of Charles A. Johnson, Certificate No. 281969 (7 Fee P. L. Bk., 504), dated June 10, 1891, it is recited:

There is nothing in the articles of agreement to show he (the claimant) intended that they should apply to a part of the claim.

In the decision in the case of Lars Larsen, Certificate No. 55562 (28 Fee P. L. Bk., 380), dated April 3, 1897, the appellants endeavored to show by evidence that the intent of claimant and appellants was to stipulate that the latter should receive a fee of \$25 for securing additional pension. It was held, however, that the fee agreements applied to the claim for straight increase, as the fee agreements were sufficiently definite for the purpose, and that extrinsic evidence was not admissible for the purpose of varying their terms.

And again, in decision rendered February 26, 1898, in the case of Samuel E. Tasher, Certificate No. 64608 (30 Fee P. L. Bk., 489), the following language is used:

As to whether fee agreements apply to a claim for increase on account of pensioned disability pending when they are filed, the Department has invariably held that they would so apply in the absence of language importing that they are restricted in their application to the claim for additional pension. (Citing the case of Charles A. Johnson, *supra*, and the case of Isaac Johnson, *supra*.)

The case of Peter F. White, *supra*, and all the following cases cited, emphatically evidence that fee agreements apply to claims for straight increase in the absence of a specification limiting their application to claim for additional pension.

Furthermore, the rule laid down in the cases of Amos Silvis and Jacob C. Spiers, *supra*, directing that a fee be certified to an attorney in a straight increase claim, in addition to the amount stipulated in fee

agreements limited in their application to a claim for increase on account of a new disability, has been followed in the practice. This is evident from the fact that but four appeals have been entered since 1888, in which the violation of said rule has been assigned as error, and the facts warranted such assignment.

In a recent case, Joseph M. Eason, Certificate No. 485755 (31 Fee P. L. Bk., 168), decided April 16, 1898, in affirming the practice, I said:

It can not be presumed that the claimant is incompetent to make a contract. As fraud is not shown, the fee agreements should be construed as they read—or rather applied—as there is no room for construction. As stated in your report, the Department has held that under the conditions recited (and they are the same as in the case under consideration) an appellant is entitled to the fee provided by law for securing the allowance of a claim for straight increase, in addition to a fee for securing additional pension. No good reason can be assigned for an exception to the rule when parties by a valid contract have adopted the rule and practice.

It remains but to state that the fee agreements in this case are not general in their application. In specific terms they relate to the claim for additional pension alone. The intent is sufficiently manifest. Therefore, appellants were entitled to the fee stipulated in said agreements upon securing the allowance of the claim to which they relate. They are also entitled to an additional fee of \$2 for securing the allowance of pension in the claim for straight increase. As the latter fee was denied them, the action of the Bureau in the claim for straight increase is reversed with the direction that a fee be certified the appellants in that claim.

DEATH CAUSE—PATHOLOGICAL SEQUENCE.

JULIA A. E. WATKINS (WIDOW).

The evidence shows the fatal disease of the heart to have arisen either from diarrhea, malarial poisoning (pensioned causes), or from rheumatism. All of said diseases may have been an important factor in inducing the fatal disease. The special examination shows rheumatism to have been of service origin. The medical referee holds that fatal disease resulted from rheumatism.

Held,

1. Death was the result of diseases contracted in the service and line of duty.
2. The opinions of the medical referee are not binding upon the Secretary, but are expert evidence, and will be treated as such by the Department.

Assistant Secretary Webster Davis to the Commissioner of Pensions, May 15, 1899.

Julia A. E., widow of Charles Watkins, formerly a private in Company B, Ninth Vermont Volunteer Infantry, filed her application under the general law on April 20, 1895, claim being rejected on January 15, 1897, on the ground that death was not due to the service. An appeal filed on March 1, 1897, contended that rejection is contrary to the evidence.

Soldier was pensioned under the general law at \$17 per month by

reason of right inguinal hernia, chronic diarrhea, and resulting piles, and malarial poisoning. The last adjudication was had on August 18, 1893, and malarial poisoning appears to have been omitted on the face brief in the approval for continuance, but it is apparent that the omission was a clerical error. Soldier died on February 27, 1895, the physician's certificate of the cause of death on file in the records of the board of health in Worcester, Mass., showing the

First or primary cause, chronic diarrhea and hemorrhoids and malarial poisoning. Duration of years. — (†). Secondary, diarrhea and heart disease. Duration of three months. * * *

The attending physician having testified in this case, giving his reasons for his belief as to the cause of death, the case was returned to the medical referee for his personal opinion. In his reply dated April 4, 1896, the said official gave, in turn, his reasons for his holding that the disease of the heart was the governing factor in death, and that it was not due to the pensioned causes, adding, "there is no known pathological connection between pensioned diseases and rheumatism and disease of heart." The statement was brought out from the fact that the issue in this case was: Did the disease of heart result from diarrhea and malarial poisoning, or did it result from rheumatism? The Bureau decided that it resulted from rheumatism, and hence, there being no pathological relation between diarrhea and malarial poisoning, and rheumatism and disease of the heart, the claim was rejected.

Now, the statement referred to as to pathological connection was not in accordance with views previously expressed by the medical branch of your Bureau, for, in the claim of L. C. Lawrence, Seventh Battalion, Massachusetts Volunteer Infantry, Certificate No. 723299, Medical Referee Ingram had approved the claim for disease of heart resulting from chronic diarrhea; and again, in the claim of George W. Wesson, Company H, Third Massachusetts Volunteer Cavalry, Medical Referee Campbell had approved the claim for malarial poisoning and resulting disease of heart. The case was, therefore, again returned, calling attention to above facts, for the opinion of the present medical referee, and requesting—

* * * that he give the Department his opinion as to whether there is a valid medical hypothesis for rejecting this claim upon the ground that there is no known pathological connection between chronic diarrhea, malarial poisoning, and disease of heart.

It was further said:

The medical referee is requested to state fully any medical theory, fact, or hypothesis which is made the basis of the opinion herein requested.

The above request resulted in an exceedingly careful and comprehensive review of this particular case, dated June 2, 1897, the former action being sustained; the fact that soldier had previously alleged rheumatism as of service origin, and the several medical examinations having shown the presence of said disease, seeming to play quite an

important part in your conclusions. This was not responsive to the request, the only point of the said opinion which was responsive being the following statement:

It will be admitted that, in exceptional cases, and under particular and peculiar conditions, organic disease of the heart may originate in connection with chronic diarrhea or malarial poisoning. But in such cases the facts must be clear and the proof convincing before the pathological relation can be admitted.

Upon receipt of the opinion I noted that the former statement as to no pathological relation between diarrhea and malarial poisoning and disease of heart was not adhered to, but no grounds of any kind were given for the change of views. What facts were necessary to be shown, what particular and peculiar conditions, and what proof would be considered as being convincing, was not touched upon, and consequently the Department did not have the information desired and requested. I therefore again returned the files to you, calling your attention to the very important omission, and stating:

Now, it is apparent that I can not properly review cases when such issues are raised unless I know what are those 'particular and peculiar conditions,' which must be made so clear as to be *plena probatio*. While it may not be possible to lay down any invariable rule which will be a criterion for all cases, yet I conceive it probable that the medical referee may be able to give a general statement, and perhaps with some degree of particularity, as to what physical conditions would give rise to an honest presumption that, by reason of such conditions, disease of heart might fairly be attributable to either malarial poisoning or chronic diarrhea.

It being apparent that rheumatism had not only entered seriously into the claim, but was destined to play an important part in the future, I instructed you to first pass upon the question of service origin of said disease, which disease had been previously alleged in the soldier's claim, and to then hand the papers to the medical referee for a more complete elaboration of his views.

A special examination was had, and you held, on February 24, 1899, that service origin of rheumatism was not satisfactorily shown. This point having been settled by you, it will be held to be subject to review later on in this opinion, for the reason that service origin of rheumatism was alleged before the soldier's death, and, as has been already noted, the question plays a very important part in the holding of the medical referee.

As to a pathological relation between chronic diarrhea and malarial poisoning and disease of heart, the medical referee holds as follows, under date of May 1, 1899:

Organic disease of the heart is never a primary pathological result of malarial poisoning or chronic diarrhea, but always secondary. There are cases of profound secondary anemia, due to malarial poisoning and persistent chronic diarrhea, in which the heart is involved, fatty degeneration of the heart due to the profound anemia leading to cardiac dilatation and, maybe, to *relative* insufficiency of the valves. In such cases there is no actual valvular lesion. The insufficiency, if it occurs, is due to the dilatation of the heart cavities, by reason of which the unchanged valve segments are no longer competent to close the ostia. This condition is very different

from endocarditis of rheumatic origin. The history of such cases will be clearly and convincingly the history of malarial cachexia, with *greatly enlarged spleen*, probably enlarged liver, anhydremic state of the blood, weakness, palor, wrinkled and saffron-colored skin, feebleness of the circulation, dyspnea, various manifestations of functional disorder of the heart, fatty degeneration, followed by lack of nutrition and dilatation, and *always* the profound anæmia. The same symptoms, without the enlarged spleen or diseased liver, associated with chronic diarrheal discharges, would be the history in cases of chronic diarrhea. Indeed, the history of cases when organic disease of the heart can properly be admitted as due to malaria or diarrhea will be so "clear" and "convincing" that there can be no question but that organic disease of this organ is symptomatic of profound anæmia, itself clearly secondary to the malaria or diarrhea. Malaria or diarrhea does not produce acute or chronic valvulitis, as does rheumatism.

It is proper that I should state that the term *organic* is used to denote any structural change in an organ; and that there are a variety of structural changes that may occur in the heart. Change in structure where the valves are the seat of disease is the result of endocarditis and is the condition that so frequently results from rheumatism. Valvular disease of the heart, due to an inflammatory process, is not found as a result of malarial poisoning or chronic diarrhea, either primary or secondary.

In conclusion, I can not be too emphatic in making the statement that such questions of pathological results can only be determined after most careful consideration of the *history of each case* by persons of medical education, qualified by reason of a competent knowledge of pathology, to fully appreciate the history of the case and to make a differential diagnosis. It is impossible to lay down any rule of pathology to govern in a class of cases.

In reference to the fact that former medical officers of this Bureau have, in certain cited cases, accepted disease of the heart as a result both of malarial poisoning and chronic diarrhea, I would say that the rapidly accumulating facts in every department of pathology necessitate the changing of opinions on many questions in said science.

The foregoing is a sound exposition of the question raised, and gives the Department a basis upon which to form a conclusion in this and similar cases, and will be of great aid in the future in determining as to whether, in a given case, disease of the heart can be admitted to have resulted from either chronic diarrhea or malarial poisoning; and if the present case depended wholly upon this particular issue, the case would have to fail: and this for the reason that a condition is not shown by reason of chronic diarrhea and malarial poisoning, whereby it could be reasonably concluded that it resulted in disease of the heart. I reach this conclusion inferentially by reason of facts which are summed up as follows in the opinion of the present medical referee dated June 2, 1897:

It is admitted that the evidences of existing rheumatism are not well marked, but it is not necessary that they should be. The history of the case, as reiterated by the soldier, is that of rheumatism in the past. His statement as to medical treatment prior to 1885 has been quoted. A valvular lesion may result from a rheumatic endocarditis and exist for many years before it is manifested by symptoms which cause the patient to seek medical advice, while at the same time there may be no permanent lesion of the joints or other structures. The condition of the heart as shown in this case is such as is a frequent and usual sequel of rheumatism.

It is also to be observed, from an examination of the several certificates of examination, that the extent of disability from chronic diarrhea and malarial poisoning

was not at any time of a very considerable importance. In 1881 no disability except the hernia was found. In 1886 the liver, spleen, and abdomen were normal, but the heart was shown to occasionally intermit. In 1887 the abdomen was tympanitic, and there was slight apparent enlargement of the liver and spleen. About the same was indicated in the certificate in 1891. The last certificate, in 1893, revealed "no tenderness over stomach and bowels. Liver and spleen normal." The condition of the heart, as shown by the several examinations, has already been set forth. It is quite certain that this disease of heart existed before there was or could be any serious organic disease of the liver as might possibly be a factor in its causation.

Dr. Banfield, in his affidavit, filed October 4, 1895, testified to medical treatment for the various diseases. " * * * with resulting hepatic disease, involving the portal system, and resulting heart disease during the last three or four years." It has already been shown that at the time of the examination in 1887, in which Dr. Banfield participated, a valvular disease of the heart existed, thus antedating by at least four years the origin as stated in this affidavit.

It will be admitted that in exceptional cases and under particular and peculiar conditions organic disease of the heart may originate in connection with chronic diarrhea or malarial poisoning. But in such cases the facts must be clear and the proof convincing before the pathological relation can be admitted. In a case presenting such a history of these diseases and also of rheumatism the consensus of medical opinion will attribute an organic disease of the heart, such as existed in this case, to the rheumatism.

In view of the foregoing the case up to this point may be stated as follows: That soldier died of disease of heart is an established fact, and in reaching a conclusion as to the cause of said disease of heart there appears to be more reason to believe that it was the result of rheumatism rather than of chronic diarrhea and malarial poisoning. This conclusion is partly reached by reason of the two later opinions of the medical referee and a review of the special examination held under instructions which, together with soldier's statements, disclose the following:

On March 27, 1887, soldier alleged rheumatism as of service origin, and on March 7, 1889, he filed an affidavit alleging that he contracted it in the winter of 1864 and 1865. At the time the special examination was held (the past winter) some thirty-four years having elapsed since soldier's discharge, it was difficult to obtain evidence concerning existence of rheumatism in the service. Two comrades, however, were found, Frederick Bressette, of Cohoes, N. Y., and Chauncey Maxham, of Port Alleghany, Pa., both of whom are men of excellent reputation, and who were wholly unbiased. Bressette testifies that Watkins had rheumatism in the year 1864, and that he contracted it from exposure. This affiant bunked with soldier, and states that the disease affected him mostly in his limbs, and that he complained of a soreness all over his body. Witness saw him shortly after discharge, and testifies clearly that he was then in much the same condition as to rheumatism as when he last saw him in the service, and that soldier remarked that he was still suffering from rheumatism. Witness's date as to incurrence is possibly a few months earlier than that alleged by soldier.

Maxham testifies that soldier was suffering from rheumatism during the winter of 1864-65, thus corroborating soldier's statements. This

affiant does not readily recall any other ailment of claimant, but is positive that he had rheumatism. The testimony of both of these witnesses is noticeably deficient in any attempt to exaggerate or to bolster up the claim. Their testimony, although not voluminous, is straight to the point, without any garnishment.

The widow testifies that soldier came home from the Army in a generally stiffened condition, more especially noticeable in his left kneejoint, which was considerably swollen. It was not of any serious moment, but did interfere some little in the following his trade as a carpenter. For years the rheumatism slowly progressed, but quite early attacked his hands and fingers. A son, who was 16 years old when his father returned from the Army, remembers the stiffened condition of his father, and testifies to the slow but gradual increase of the affliction. A younger son, who was 11 years old at soldier's discharge, recalls the rheumatic condition by reason of the fact that his father could not get out of his chair easily on account of stiffness; but he recalls it the more readily on account of the fact that his father was fond of playing the violin, and had difficulty, after his return from the Army, in fingering the strings, finally giving it up when his fingers got too stiff. A daughter, who was 5 years of age at her father's discharge, testifies that as far back as she can remember her father was stiff in his legs and fingers, and states that she remembers rubbing his legs many times to ease the rheumatic pains. A noticeable feature in the testimony of the widow and children is the absence of any tendency to exaggerate the early manifestation of the trouble and their statement of such facts as would naturally attract their attention without trespassing upon the realm of possibilities and imagination. Their testimony convinces me that soldier came home from the Army afflicted some little with rheumatism, which progressed slowly but surely through all the succeeding thirty years.

Affiant Hinckly became acquainted with soldier in 1874, and was a close friend up to the date of his death. He recalls the rheumatic condition of claimant from his earliest acquaintance, by reason of the difficulty soldier had in walking, especially uphill, being very stiff. Affiant was fond of music, and testifies to the condition of claimant's fingers, which made it extremely difficult to manipulate the strings on his violin. This witness is of unquestioned veracity, and his testimony is of the same high character as that heretofore recited. Soldier moved to Worcester, Mass., in 1874, and other witnesses testify to the gradual increase of the rheumatic condition during the succeeding years.

The attending physician testifies that soldier for many years showed condition which might have been the natural results of rheumatism, but he stoutly adheres to his former opinion that the disease of heart which caused death is more clearly traceable to the pensioned disabilities than to rheumatism.

Two facts have arisen in this case, both of which have an important

bearing upon the claim. (1) The disease of heart must, under the evidence, be attributed to pensioned causes or to rheumatism; and (2) the unquestioned reputation of all of the witnesses and the absence of any exaggeration or magnifying of facts testified to.

The medical referee, after very careful investigation, concludes that rheumatism is responsible for the fatal disease of heart, and the attending physician concludes as positively that the pensioned disabilities caused the disease of heart. It does not, however, as the case now stands, become necessary for this Department to decide as between the two. I believe this to be one of the few cases which have come under my observation where it is impossible to decide squarely as to what was the chief specific factor in inducing the disease of the heart. I believe that service origin of rheumatism has been well shown, and this being true, it is immaterial what was the specific cause of the fatal disease. It was, in any event, of service origin. If a complication of diseases of service origin caused the disease of heart, then this case falls within the rule laid down in the case of Mary A. Cox (3 P. D., 313), and sustained by me in the case of Napoleon B. Trask (9 P. D., 113), as to death caused by a complication of diseases which were of service origin.

I therefore hold that soldier died by reason of disease contracted in the service and line of duty. The action herein is vacated, and the claim should be adjudicated in accordance with such holding.

I further hold, in accordance with the opinion of the medical referee herein quoted, that disease of the heart may result from chronic diarrhea or malarial poisoning, but that the pathological relation will not be admitted unless such conditions mentioned by the medical referee in his holding herein are substantially shown.

Referring to the last report of the medical referee, and without designing to be hypercritical in the slightest degree, I again quote:

In conclusion, I can not be too emphatic in making the statement that such questions of pathological results can only be determined, after most careful consideration of the *history of each case*, by persons of medical education, qualified by reason of a competent knowledge of pathology to fully appreciate the history of the case and to make a differential diagnosis.

Now, in order that no misapprehension or misunderstanding may arise, it may be well to state: The Secretary is charged by law with the reviewing of pension cases on appeal. Such a review necessitates an examination of all of the evidence and a conclusion based upon all of the evidence. No one part or class of evidence can be taken to the exclusion of the other evidence, unless there is a lawful reason for so doing. In purely medical questions it has been said, in the case of John J. Hill (7 P. D., 143), regarding the medical referee,

* * * that his opinions are entitled to great weight. He is the medical adviser to the Commissioner on questions relating to an accurate knowledge of medical science, and his opinions on such questions should generally be allowed to prevail, and are generally adopted by the Department, but are not binding upon it.

If they were binding on the Department, no appeal would lie to the Secretary in many cases, for such cases would already have been judged beyond appeal, and thus the law would be circumvented. When in any given case the opinion of the medical referee is sought and obtained, such opinion becomes evidence; and it is, moreover, evidence of the very highest character. But this is no reason why other evidence should be excluded. It is very true that the Secretary can not be expected to be well versed in all sciences, and that he should seek through authorized channels the views of experts upon scientific matters. But it must be remembered that in reviewing cases on appeal the Secretary must virtually sit as a judge upon matters of law and as a jury upon matters of fact. The opinions of the medical referee as to medical matters are, to the Secretary, purely expert evidence, produced in order that he may arrive at an honest and intelligent conclusion. These opinions go to the facts in a case and not to the law, and thus they come before the Secretary acting as a jury in trying facts.

The opinions of medical experts are not conclusive, but are to be weighed by the jury like all other evidence. (Lawson on Expert and Opinion Evidence, 254.)

The medical referee states in his opinion of May 1, 1899, that—

“ . . . questions of pathological results can only be determined . . . by persons of medical education, qualified by reason of a competent knowledge of pathology, to fully appreciate the history of the case and to make a differential diagnosis.

This is true so far as procedure in the Pension Bureau is concerned, and it is sound procedure; but so far as it affects the Secretary, it should not be forgotten that the Secretary's duty, in considering an appeal, is vastly different from the duty of the medical referee acting as adviser to the Commissioner of Pensions. But even so far as this is concerned, the Commissioner of Pensions is not bound by the opinion of the medical referee. He can overrule him, upon purely medical questions, if in his judgment the facts in a given case warrant it. (Samuel Hook, 8 P. D., 367.) If the Secretary were bound by the opinion of the medical referee upon any question, it would in pension claims make the medical referee the sole arbiter of many cases, and preclude an appeal from having any virtue. And further, such a rule would do violence to all known law. Juries are daily called upon to decide the most abstruse and difficult questions of science when perhaps not a single jurymen has any personal knowledge as to the particular science involved, or to the question arising thereunder. Yet the jury must, under the law, decide these difficult questions by the aid of the testimony presented. In like manner must the Secretary, when called upon to decide a question of fact, decide such question impartially and without favor, upon all of the evidence presented, giving the expert evidence only such weight as in his judgment it is entitled to. He is charged by law with such duty, and such duty must be fulfilled.

I again reiterate that the opinions of the medical referee upon purely

medical matters are of the highest class of evidence, and the Department has invariably given them great consideration. But they are, nevertheless, simply expert evidence, and are only followed and given such weight as, in the judgment of the Secretary, they are entitled to. The wisdom of such fact is apparent in the case at bar. The present medical referee differs from his predecessor upon the question of a pathological relation. If the Secretary was bound by the opinion of the former medical referee, the opinion of the present official upon the issue would have to go for naught. I conceived, however, that it was necessary, in the interest of justice, that the opinion of the present medical referee be obtained, and I could thus set expert evidence against expert evidence and arrive at a more just conclusion. I have done so in this case. All questions, on appeal, must be determined by the Secretary upon all of the evidence, using the opinions of the medical referee as an aid in arriving at a conclusion when the facts in a case involve medical questions. In fact, I am quite sure that the medical referee agrees that such procedure is imperative, for he states, in closing, in his last opinion in this case:

I would say that the rapidly accumulating facts in every department of pathology necessitate the changing of opinions on many questions of said science.

The action appealed from is reversed.

DISLOYALTY—SECTION 4716, R. S., AND ACT JUNE 27, 1890.

CALVAN SHINAUGH.

Section 4716 of the Revised Statutes is applicable to pension claims filed under section 2 of the act of June 27, 1890, and the decision in the case of G. W. Gilbert (9 P. D., 279), under the advice of the Assistant Attorney-General, is adhered to.

Acting Secretary Thomas Ryan to the Commissioner of Pensions, May 18, 1899.

Your letter of the 10th instant has been received, submitting for consideration the papers in the pension claim of Calvin Shinaugh, late of Company D, Third North Carolina Mounted Infantry, under section 2, of the act of June 27, 1890.

You call attention to the fact that the claim has been rejected under section 4716 Revised Statutes United States, and express the opinion that said section is not applicable to claims under section 2 of the act of June 27, 1890, and suggest that departmental decision to the contrary should be reconsidered.

In response thereto, I transmit herewith an opinion of the Assistant Attorney-General for this Department, to whom the matter was referred, in whose conclusions as to the correctness of departmental decision, dated March 26, 1898, in the claim of G. W. Gilbert (9 P. D. 279), the

Secretary of the Interior concurs, as is evidenced by the indorsement of his approval thereon. Said opinion is as follows:

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE ASSISTANT ATTORNEY-GENERAL,
Washington, May 17, 1899.

THE SECRETARY OF THE INTERIOR.

SIR: Under your reference I have examined the pension claim of Calvin Shinaugh, formerly of Company B, Third North Carolina Mounted Infantry, No. 1155778, presented under section 2 of the act of June 27, 1890 (26 Stat., 182), and rejected under section 4716 of the Revised Statutes, because the claimant had voluntarily engaged in, aided, and abetted the late rebellion against the authority of the United States.

I have also considered the letter of the Commissioner of Pensions, dated May 10, 1899, wherein he expresses the opinion that section 4716 of the Revised Statutes does not apply to claims under section 2 of the act of June 27, 1890, and suggests that the departmental decisions to the contrary should be overruled.

The opinion of Assistant Secretary Davis, rendered March 26, 1898, upon the claim of George W. Gilbert, and reported in 9 Pension Decisions, 279, accurately sets forth the legislation of Congress affecting this question, properly states and applies pertinent rules of interpretation, gives full consideration to the arguments now presented by the Commissioner of Pensions, and announces the conclusion that section 4716 of the Revised Statutes does apply to claims under section 2 of the act of June 27, 1890, and that therefore one who voluntarily engaged in or aided and abetted the rebellion against the authority of the United States is not entitled to receive a pension thereunder.

In my opinion, the conclusion reached by Assistant Secretary Davis is correct, and his presentation of the matter is so comprehensive as to preclude elaboration. I therefore recommend that the decision in the Gilbert case be sustained.

Herewith are the papers.

Very respectfully,

WILLIS VANDEVANTER,
Assistant Attorney-General.

DEPARTMENT OF THE INTERIOR.

Approved May 17, 1899.

E. A. HITCHCOCK, *Secretary.*

MARRIAGE AND DIVORCE—IMPEDIMENT.

FREDRICKA KENT (WIDOW).

Soldier married claimant by ceremony in 1864, when he had a former wife living, who was divorced from him twenty-three months thereafter. Claimant and soldier lived together as husband and wife, and were so recognized by their neighbors and relatives, for twenty-six years after the removal of the impediment to their marriage, and up to the date of soldier's death.

Held, That under the laws of the State of Ohio, where the parties resided, a common-law marriage contracted after the removal of said impediment will be presumed. (*Bremer v. Briggs*, 32 Ohio St., 378, and *Swartz v. State*, 33 Ohio C. C. Rep., 62.)

Assistant Secretary Webster Davis to the Commissioner of Pensions,
May 22, 1899.

Fredricka, as widow of Robert E. Kent, formerly a private in Company E, Twenty-first Illinois Volunteer Infantry, filed her application under the act of June 27, 1890, claim being rejected on August 31, 1894, on the ground that claimant was not the widow of the soldier. An

appeal filed on February 17, 1898, contends that rejection is contrary to law.

The facts in this case may be summed up as follows, the witnesses agreeing upon all points.

Robert E. Kent, the soldier herein, married Maria L. — (?) on August 27, and in the year 1853 or 1854, at Circleville, Ohio. Shortly thereafter, as near as can be ascertained by the evidence, which was not well taken upon that and other points, the couple resided in the town of Lancaster, Ohio, to which place the soldier had come when a youth, probably from Virginia, some fifteen years previous. During all of his residence in Ohio, before and after marriage, he was acquainted with claimant, who was a German domestic and unable to read or write. That claimant and soldier, either before or after the marriage referred to, were criminally intimate does not admit of doubt, and it appears that a child, the fruit of this illicit intercourse, died soon after birth. It is not material as to when this intimacy was in progress, although the fact of said intimacy has a collateral bearing on the main issue herein.

Some two years before the war of the rebellion, soldier and his family moved to Illinois, from which State he enlisted in 1861, being honorably discharged from the service in 1863, returning to his family at Lovington, Ill. Disagreements and discussions soon arose between the soldier and his wife, and the soldier shortly after left his wife and went back to Lancaster, Ohio. Here he renewed his acquaintance with claimant, although not in a criminal way, and informed her that he was divorced from his wife, exhibiting some papers to her, stating that they were his divorce papers, and proposed marriage. He told his sister, who has testified in the case, the same story, and she believed him. In fact, it is in evidence from the testimony of excellent witnesses that it was universally believed, without exception, that soldier had been divorced and was at liberty to marry claimant. Claimant not being able to read or write, did not examine the papers shown her, but accepted soldier's statements as true, and was married to him, by ceremony, on April 25, 1864.

In March, 1866, the former wife obtained a divorce from soldier in Sullivan County, Ill., no knowledge of such proceedings appearing to have ever reached the ears of claimant or soldier's relations or acquaintances. From April 25, 1864, up to the soldier's death on October 3, 1892, soldier and Fredricka lived and cohabited as man and wife, and were universally acknowledged as such by their acquaintances—children being born to them—not a single individual in the community ever suspecting that there was any impediment existing at the date of this marriage. It may be further stated that some little time after the second marriage two of soldier's children by the first wife were taken into the family and brought up by soldier and claimant. The fact that the divorce was not obtained until twenty-three months after the cele-

bration of the second marriage appears to have been first brought out by claimant's attorney, who investigated the matter during the prosecution of this claim. Soldier not only successfully deceived claimant, but he also successfully deceived his relations, neighbors, and acquaintances in this particular. That he was something of a Lothario in his early days must be admitted, but it should be stated that from the time he married claimant up to the time of his death his life was an exemplary one. Both he and Fredricka became members of the Episcopal Church shortly after their marriage, and they lived together continuously in Lancaster, Ohio, as man and wife, brought up a family of children, and had, without exception, the respect and countenance of their neighbors, acquaintances, and relations for the succeeding twenty-eight years, until his death.

I have narrated the facts somewhat in detail, for it will presently be seen that they all have an important bearing upon the case.

Section 2 of the act of August 7, 1832, recites:

Marriages * * * shall be proven in pension cases to be legal marriages according to the laws of the place where the parties resided at the time of marriage, or at the time when the right to pension accrued.

It becomes necessary, then, the marriage having taken place in Ohio, to determine what is the law in the State of Ohio upon the issue here presented.

It is indisputable law that whenever either party to a marriage has been previously married, said first marriage never having been dissolved, the second marriage is not voidable, but is a nullity and absolutely void; and further, that when or after the said impediment has been removed there must be, in order that the second marriage become valid, a new relation entered into. (Stewart on Mar. and Div., secs. 76 and 132 and cases cited.)

No ceremony having been performed subsequent to the one of April 25, 1864, if claimant can maintain her case it must be upon the theory that after the decree of divorce was obtained, in March, 1866, a common-law marriage came into existence. The first question, then, is as to whether, and if so under what conditions, a common-law marriage is recognized in the State of Ohio. There having been some doubts raised during the adjudication of this claim as to the above query, it is well to have it disposed of.

As to the general proposition regarding the validity of a common-law marriage, we have the rule laid down by the Supreme Court of the United States in *Meister v. Moore* (96 U. S., 76), viz:

Marriage is everywhere regarded as a civil contract. Statutes, it is true, regulate the mode of entering into the contract, but they do not confer the right. * * * Whatever directions they may give respecting its formation and solemnization, courts have usually held a marriage good at common law to be good notwithstanding the statutes, unless they contain express words of nullity.

A careful examination of the statutes of Ohio not only fails to disclose any express words of nullity regarding a common-law marriage,

but there are decisions of the supreme court of said State which bear directly on this issue.

In the case of *Carmichael v. State* (20 O. S., 553), the issue was one of bigamy, the second marriage by reason of which Carmichael was prosecuted not having been solemnized under the statutes. The court said, in passing upon this marriage, that they should adhere to that—

* * * rule of construction which appears to be established by the authorities, that a marriage good at common law is good notwithstanding the existence of any statute on the subject, unless the statute contains express words of nullity.

The court further stated:

It is said by the judge in *Catterall v. Sweetman* (1 Rob. Ecc. Rep., 304-307): "So far as my research extends, it appears that there never has been a decision that any words in a statute as to marriage, though prohibitory or negative, have been held to infer nullity unless that nullity was declared in the act."

It was held in this case (*Carmichael v. State*)—

* * * that it was to be inferred from the statement that the parties openly and mutually consented to a contract of present marriage then to become husband and wife, and thereafter cohabited as such, and that this constituted a legal marriage.

In a later case (1883), *Bremer v. Briggs* (32 O. S., 478), the court said:

It is now too well settled to admit of dispute that in all civil actions, when the rights to succession of an estate depend on the existence of a marriage, it may be proved by reputation, declaration, and conduct of the parties.

The court summed up its finding as follows:

A marriage, in fact, may be established by showing that they lived together and cohabited as man and wife for a series of years; that they always recognized and treated each other as such, and that they were so treated and respected in the community and circle in which they moved.

See also to the same effect *Railroad Co. v. Cobb* (35 O. S., 94).

Further argument upon this particular point would seem to be superfluous, and I accordingly hold a common-law marriage to be valid and legal in the State of Ohio.

As to a common-law marriage arising upon the removal of a preexisting impediment, it can not be successfully denied but that the appellate courts in different States are not in unison in their opinions upon a given state of facts, but it is evident that the general scope of the decisions upon this point are plainly divisible into two classes. First, those which compel a showing that a new relation has been entered into after the removal of the impediment, such relation to be established upon evidence proving that the parties were aware of the removal of the impediment, and that they thereafter practically agreed to a new contract. Second, those which allow a presumption of a new contract to obtain by reason of such conditions as would prove a common-law marriage. The decisions in both classes are founded upon the establishment of a common-law marriage, but one class relies upon proof that a new relation has been actually entered into as a fact, while the other class rests upon a presumption of such a fact. The line between these two classes is a broad one, and is as clearly discernible as that which separates a

proof of actual death, and those facts upon which a presumption of death rests, or as between something proved by direct or something proved by circumstantial evidence. That to the second class belong the decisions of the Ohio appellate courts will be seen, by references made later on in this opinion.

I desire to call particular attention at this point to the fact that the decisions mentioned in the second class are not always parallel ones; that is, they vary widely according to the State in which the decision emanates. The courts of one State allow a presumption of marriage to attach, when the courts of another State do not under the same circumstances and conditions. It is hazardous, therefore, in discussing as to what evidence would be sufficient on which to found a presumption of common-law marriage after an impediment is removed, in any certain State, to refer, as to principles, to decisions of other States, even if the facts are the same or equivalent. The only safe procedure, in view of the terms of the act of August 7, 1882, is to follow closely on the steps of the appellate courts in the State in which the case arises; for a resort to doctrines laid down and decisions rendered in other States will generally lead, as to this particular issue, to inextricable confusion. Following, then, what seems to be the safest lines, it is necessary to determine, from the decisions of appellate courts of the State of Ohio, what facts, conditions, or circumstances are necessary to be evidenced in order that a common-law marriage may be presumed to have been consummated after an impediment has been removed, which impediment has made a former ceremonial marriage null and void. Or, to be some little more explicit, and to cover a greater variety of cases, to discover if, in the State of Ohio, a marital tie, illicit at inception, may become a valid and legal one by reason of presumptions attaching after an impediment has been removed.

After an exhaustive search, I find but one case in the State of Ohio in which the issue is discussed (and this is found in XIII Ohio C. C. Rep., 62), being the appeal in the case of *Swartz v. State*, the verdict being sustained. The facts were as follows: Swartz was indicted and tried for bigamy and was found guilty in the trial court. It appears that Swartz formerly had illicit relations with one Henrietta, but that later on they assumed the relation of man and wife, evidenced only by reputation, cohabitation, and declarations. They lived thus for some nine years, and raised two children. Thereafter Swartz married, under the statute, one Kittie Stoner. He was arrested for bigamy, and the defense sought to show that there had been but one marriage, the attempt being made to disavow the union between Swartz and Henrietta.

The trial judge in passing upon the question as to whether the common-law marriage between Henrietta and Swartz was valid, used this language:

This marriage is as just and valid in Ohio as though a chime of bells played a wedding march, and a half a dozen bishops and clergymen assisted at the ceremony before a thousand people.

The appellate court not only sustained the holding but approved the language as a correct expression of the law. In further discussing the case the appellate court took up the question as to a marriage illicit at commencement, raising the issue as to whether a common-law marriage could be presumed to have been entered into later on, the issue being identical with that arising under the present appeal. Note well that in the Ohio case it was a question of presumption, and not one based upon subsequent contract, after the illicit feature was removed. The court cited with favor, in discussing the proposition, the case of *Yates v. Houston* (3 Tex., 433), in which case Tabitha Harris married one Jiams, Jiams having a wife living at the time, Tabitha being then cognizant of the fact that Jiams had this wife. The Texas court first allowed the presumption of the death of the first wife to attach, and then stated that the continued cohabitation after the presumption of death attached was enough to confirm the marriage status of Tabitha. The Ohio court further quoted the following rule from Bishop on Marriage and Divorce:

Though the intermarriage between the parents may have been admittedly wrongful and illicit in its inception, because of some legal impediment to marriage, yet after its removal slight circumstances may and ought in a doubtful case to be pressed into service for showing that the parties have converted what was at first an unlawful into a subsequent lawful union.

They further considered the following rule, found in *State v. Worthingham* (23 Minn., 523) to be sound; although it should be stated that the courts of most of the States hold to the contrary opinion in the abstract. (See cases cited in *Mary B. McCollum*, 6 P. D., 93.) The presumption that a cohabitation illicit at its inception remains such in character during its continuance is one of fact for the jury, and not one of law. The Ohio court closed its opinion by citing with approval the case of *Peet v. Peet* (52 Mich., 464), in which the following language occurs:

On much less evidence than the living together for twenty years, and the bringing of 13 children into the world, marriage has been inferred, even in cases where the cohabitation was shown to be meretricious in its origin.

Note well that the above holding (in *Swartz v. State*) was in a criminal case, the question of bigamy being at issue, and that the appellate court sustained the verdict of guilty by holding that a common-law marriage should be inferred to have been resolved from a former illicit connection, after the illicit feature was removed. If they held thus in a criminal case, there can be no question as to what they would hold in a civil case.

There is but one conclusion to be drawn from the foregoing, and that conclusion is: The Ohio courts hold that a common-law marriage may be presumed after the removal of an impediment that invalidated a former marriage between the same parties.

Summing up, then, the case under review we find that from March 1, 1866, at which date the impediment existing to the marriage between the

soldier and Fredricka was removed, up to 1892, a period of twenty-six years, the soldier and Fredricka lived and cohabited together, held themselves out by action and declaration to be husband and wife, raised a family of children, and were universally known to be husband and wife and respected and regarded as such. Every element of a common-law marriage is present, and under the cases cited it must be held, under the laws of the State of Ohio, that a common-law marriage is presumed to have taken place from and after March, 1866.

It may be well to state that if there had been any collusion between the soldier and claimant as to an existing impediment at the time of their ceremonial marriage, such fact would completely alter the conclusion herein. It is shown, however, that there was no such collusion. Claimant had, in earlier days, been intimate with the soldier. He married and left the State, and returned after some five or six years, informing claimant that he was free to marry. Claimant could not read or write, and under the circumstances had a perfect right to rely upon the representations made. That she was justified in so doing is made apparent from the fact that it was universally believed, not only among acquaintances, but among soldier's relations, that a divorce had been previously had. Claimant's reputation for truth and veracity is good, as is the reputation of all of the affiants herein.

It is necessary to state that this opinion has to do only with this particular case, and as arising under the laws of the State of Ohio. It is not to be taken as authority in any case arising in any other State, and not in any other Ohio case only so far as the facts in such other Ohio case may be parallel. The conclusion herein appears to be the only one possible in view of the terms of the act of August 7, 1882, and the law as stated by the Ohio courts.

I hold, therefore, that the claimant herein was the legal wife, and when she filed her claim herein was the widow of Robert E. Kent.

The action appealed from is reversed.

LINE OF DUTY—ENGAGED IN ATHLETIC SPORTS.

LINDLEY RUDDICK.

It appearing from the evidence that the injury to right shoulder, alleged as basis for additional pension, was incurred by this pensioner while in camp engaged in athletic sports, and was not the result of any wrongful or improper conduct on his part, nor in violation of any rule or regulation of the military service, nor in disobedience of orders from his superior officers, it was error to hold that it had not been received in line of duty.—(Henry Newman, 8 P. D., 532.)

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
May 31, 1899.*

Lindley Ruddick, late private, Company G, Sixty-seventh Indiana Volunteer Infantry, is a pensioner under the provisions of the Revised

Statutes at the rate of \$14 per month for chronic diarrhea and resulting disease of rectum, loss of teeth and disease of gums, results of scurvy, and injury of toes, and on December 1, 1890, he filed in your Bureau an application for additional pension, renewing a claim alleged in his original application filed March 17, 1885, based on an injury to right shoulder, alleged to have been incurred in line of duty during his military service. Said claim was rejected on June 11, 1894, upon the ground that said injury was not incurred in line of duty.

From said action appeal was taken on January 27, 1898.

The official military record of the appellant's service furnishes no evidence of the incurrence or existence therein of the alleged injury to right shoulder, but the fact that he was injured as alleged during his army service, and the circumstances under which said injury was incurred, fully appear from the evidence in this case.

The account given by the appellant, on a special examination of this case, of the manner and circumstances of the incurrence of the injury to his right shoulder is full, clear, and circumstantial, and is fully and completely corroborated in every particular by several witnesses of good character and undoubted credibility who were present and witnessed the occurrence, and testify from personal knowledge, including the very comrade who was responsible for and the cause of the appellant's being injured, and its truth and accuracy does not appear to have ever been questioned, and is as follows:

My dislocation of shoulder occurred at Barancas, Fla. We were in camp there, and I think it was in February, 1865; the latter part of February or first part of March of that year. It was this way: Several of us comrades were engaged in jumping, while lying in camp at that place, and we had a habit, when defeated in jumping, of saying "pull my arm," or "pull my leg," instead of saying "I give up," or "I have lost," or such expressions as that. On one occasion I was making the third trial, and had made two hops, and saw I was going to fail—that the head man would beat me—and I turned and told the boys to "pull my arm." A comrade, Charles Spear, put his left arm around my body, and, standing at my back, caught my right arm close to the shoulder with his right hand. At the same time some other of the comrades caught me by the right hand and wrist, and pulled slightly, and just then a comrade named Jacob Stewart says, "Let me pull his arm," and those who had hold of my hand and wrist let go, and he gave it a sudden jerk backward, and Charlie Spear's hand, pressing against my humerus, acted as a fulcrum as my hand was carried backward (as claimant's hand was jerked backward), and thus the dislocation was produced. We were out jumping as mere pastime. We had no such orders from our superior officers. We were there ready for service at any moment, and were indulging in jumping as a physical exercise. We did not have much drilling then; our camp duties were not burdensome and we needed this exercise.

Accepting, then, the foregoing account of the incurrence of appellant's alleged injury as correct in all essential particulars, I am of the opinion that it could not be properly held that it was incurred out of the line of duty under the present views and holdings of this Department, as expressed in its decisions on this subject.

Although the appellant does not appear to have been acting directly

under any express orders from his officers at the time, he was, undoubtedly, not acting in contravention of any rule or regulation of the military service, or in violation or disobedience of any orders, when injured. On the contrary, he was engaged in healthful and harmless athletic sport, such as is not only permitted but directly encouraged and promoted by the military authorities when soldiers are in camp or garrison. Neither does it appear that the appellant's injury was occasioned by wrongful or improper conduct on his part, or was the result of any recklessness or negligence to which he directly contributed or for which he was to blame. He was, rather, the victim of some innocent and good-natured but rather rough and boisterous "horse play" on the part of his comrades, in which there does not appear to have been the least suspicion of malice or bad blood, and no intention whatever of hurting or injuring him. The injury appears to have been wholly unintentional and accidental on the part of appellant's comrade, and I am of the opinion that he can not be considered as out of the line of military duty when it was inflicted upon him, simply for the reason that he was at the time in camp engaged in harmless athletic exercise.

I am unable to distinguish this case from that of Henry Newman, decided October 10, 1896 (8 P. D., 532), wherein it was held that the rejection of a claim for pension based on an injury incurred by a soldier while engaged in playing a game of baseball upon the ground that it had not been incurred in the line of duty was error, and that the soldier was not out of the line of duty when so engaged. In said decision the following report from the Adjutant-General of the United States Army is quoted with approval:

Special orders are never issued directing soldiers to play baseball, nor are there any general orders on the subject, but athletic sports by enlisted men are encouraged by the Department as promoting the efficiency of the men, and it has been the rule of the Surgeon-General, concurred in by the Department, to regard injuries received by officers and enlisted men while engaged in athletic sports in camp or garrison as incurred in line of duty. (See Circular 4, Surgeon-General's Office, July 28, 1885, and paragraph 30, circular, Surgeon-General's Office, May 11, 1893.)

Circular 4, referred to in the foregoing, is as follows:

Injuries received by officers and enlisted men while engaged in athletic sports, properly indulged in by them while in camp or garrison, are to be regarded as incurred in the line of duty, provided ordinary care and prudence were exercised and that the games indulged in were not of an unfriendly nature nor in pursuance of any wager.

Paragraph 30 of the circular of the Surgeon-General's Office, May 9, 1893, reads as follows:

When a medical officer expresses the opinion that an injury occurring during athletic sports, properly indulged in, was received in line of duty, the opinion is accepted by this office as satisfactory and final.

These views and regulations of the War Department apply equally as well to the case of this appellant as to that of Newman, and it is clear, therefore, that he would not be held by that Department as having been out of the line of his military duty as a soldier when engaging

in athletic sports in camp, and that if injured when so engaged without fault, negligence, or improper conduct on his part, he would be deemed by the military authorities to have incurred such injury in line of duty.

I am, therefore, clearly of the opinion that the rejection of this claim for additional pension upon the sole and only ground that the alleged injury of appellant was not incurred in line of duty was error, and is not sustained by the facts in evidence in this case. Said action is, therefore, hereby reversed and set aside, and you are requested to cause said claim to be reopened and further considered, and adjudicated upon its merits.

Attention is invited to the fact that this decision has been strictly confined to the discussion and consideration of the single issue upon which this claim was rejected, the question of line of duty, no opinion being herein expressed or implied as to the merits of the claim in any other respect, or as to whether a pensionable disability is shown to have resulted from said injury to shoulder, these being matters not presented by the appeal and which are properly left for consideration in your Bureau upon the further adjudication of this case.

MARRIAGE AND DIVORCE—IMPEDIMENT.

HARRIET COMSTOCK (ALLEGED WIDOW).

At the date of claimant's alleged marriage to soldier, in 1865, in the State of New York, she had a former husband living from whom she had not been divorced. She continued to live and cohabit with soldier in the States of New York, Minnesota, and in Michigan, from 1865 up to the date of his death, in 1893. Her first husband died in 1866. On September 27, 1891, a marriage ceremony was performed between the claimant and soldier in the State of Michigan.

Held, That as claimant's relation with soldier was illicit in its commencement, it is so presumed to continue until a changed relation is proved, and actual marriage can not be presumed from continued cohabitation and reputation after the removal of the legal impediment by the death of her first husband. *Rose v. Rose* (67 Mich., 619); *Ellen A. Palmer* (7 P. D., 363); *Louisa S. Hoepfner* (9 P. D., 497); *Wilhelmina K. Monteton* (10 P. D., 12), and *Indiana Christie* (*ibid.*, 15).

Assistant Secretary Webster Davis to the Commissioner of Pensions, May 31, 1899.

Harriet, widow of Henry Comstock, late private Company O, Thirty-fourth New York Infantry, by her attorney, appealed January 27, 1898, from the bureau action of January 2, 1897, allowing her old-law widow's claim, certificate No. 437,387, filed December 26, 1893, at \$8 per month.

It is contended that her rate should have been \$12 per month under the act of March 19, 1886, as a valid marriage between the claimant and soldier had been established prior to the passage of that act.

Appellant's argument is as follows:

The soldier died January 31, 1893. At the time of the claimant's marriage to the soldier, on September 19, 1865, she had a husband living. She was again, legally,

married to him (the soldier) on April 17, 1891, some years after the death of her first husband. Pension was allowed under the general law at \$8 per month because their marriage did not take place until after March 19, 1886. Testimony was furnished showing that from the time of the death of the claimant's first husband until the soldier's death he and the claimant lived together as husband and wife, and, in fact, from the time of their first marriage to each other. All the facts were shown by testimony to the Commissioner of Pensions, but he paid no attention to the fact of the common-law marriage, in spite of the decision quoted.

I call your attention to the decision of your Department in the case of Margaret Anderson, page 67, vol. 4, P. D., in which it is held that "if by the law of the place where the parties dwell a mere mutual consent constitutes marriage, then if they are living together in a connection which both desire to be matrimonial, but an impediment renders the marriage void, valid marriage will instantly arise on the removal of the impediment while the mutual wish for marriage continues. It is immaterial to this result whether the impediment was known to the parties or not, nor is this a mere rule of evidence. The law makes them husband and wife." (Bishop on Marriage and Divorce, vol. 1.) Testimony was furnished showing that these parties came to Minnesota in May, 1865, living together as husband and wife, and that they continued to so live until June, 1884, when they moved to Michigan. A common-law marriage is accepted as valid in the State of Minnesota, as also in Michigan. Testimony was furnished showing that Henry Comstock, the soldier, was married to Harriet Birdsall, the claimant, in the year 1865, and that from that time until his death they lived together as husband and wife. Also testimony was furnished showing that James A. Birdsall, the claimant's former husband, died in September, 1866.

I claim that upon his death a valid marriage instantly arose between the claimant and the soldier. I also desire to call your attention to your decision rendered in the claim for pension of Margaret L. Thomas, decision No. 63, C. S. In this case the soldier at the time of his marriage to the claimant had an undivorced wife living who was subsequently divorced from him about two years after his marriage to the claimant. It is held in that case that a valid marriage subsequent to the removal of the impediment will be presumed. This was done because the claimant was the innocent party, having known nothing of the soldier's former wife, but in the decision I have quoted above it is stated that "it is immaterial to this result whether the impediment was known to the parties or not." Therefore, we believe that we have established the fact that a valid marriage arose immediately upon the death of the claimant's first husband, in 1866, and testimony having been furnished that they continued to live together as husband and wife and cohabited as such, their marriage must be accepted as having taken place prior to March 19, 1886. We therefore respectfully ask that the action of the Pension Office be reversed and that a reissue certificate be ordered granted, allowing pension at \$12 per month instead of \$8.

Soldier enlisted June 15, 1861, and was discharged June 30, 1865. He died in the State of Michigan, January 30, 1893, in which State he was married to claimant September 27, 1891.

Claimant contends that she was first married to soldier in Herkimer County, in the State of New York, September 19, 1865, but she admits that at that time she had another husband, one James G. Birdsall, living, from whom she had not been divorced; that Birdsall had deserted her and had not furnished her any support for several years prior to her said alleged marriage to soldier in 1865; that Birdsall died September 12, 1866, at which time she was living with said Henry Comstock, the soldier, as his wife, in Blue Earth County, Minn.; that she so continued to live with said soldier in Minnesota until about June, 1884, when they removed to Barry County, Mich., where she continued to reside

and cohabit as husband and wife up to September 27, 1891, when a second and a ceremonial marriage was celebrated before a justice of the peace at Castleton, Barry County, Mich., and that she continued to reside with soldier as his wife to the date of his death.

Several witnesses have testified to the domestic relations of claimant and soldier, both in Minnesota and Michigan, and that they were regarded and recognized by their neighbors as husband and wife.

It was held by Assistant Secretary Bussey (6 P. D., 200), that—

Where at the time of the marriage an impediment exists to the marriage of either party, such marriage is illicit, and no presumption in favor of marriage subsequent to the removal of such impediment can arise from the parties' long-continued cohabitation and recognition of each other as husband and wife, unless the proof shows a change in the character of their relation subsequent to the removal of impediment.

No change in the relations of these parties is shown subsequent to the death of claimant's first husband, in 1866, prior to the date of their Michigan marriage, in 1891. Claimant's alleged marriage to soldier in New York, in 1865, was void, as at that date she had a former husband who was living, and her relations with the soldier were therefore illegal and illicit.

I am of the opinion that as claimant's relation with soldier was illicit in its commencement, it is so presumed to continue until a changed relation is proved, and actual marriage can not be presumed from continued cohabitation and reputation after the removal of the legal impediment by the death of her first husband. See *Rose v. Rose* (67 Mich., 619); *Ellen A. Palmer* (7 P. D., 363); *Louisa S. Hoepfner* (9 P. D., 497); *Wilhelmina K. Monteton* (10 P. D., 12), and *Indiana Christie* (*ibid.*, 15).

The syllabus to the Michigan case (*Rose v. Rose*), above cited, decided in 1888, announces the general doctrine applicable to this class of cases as follows:

Where the relation between a man and woman living and cohabiting together is illicit in its commencement, it is presumed to so continue until a changed relationship is proved; and subsequent actual marriage will not be presumed from continued cohabitation and reputation after the legal impediment to entering into such a contract is removed.

The facts in this case are substantially similar to those in the case of *Ellen A. Palmer* (7 P. D., 363), above cited. In that case, as in this, the question arose under the laws of New York and Michigan, under the provisions of section 2 of the act of August 7, 1882, which provides that marriages shall be proved in pension cases to be legal marriages according to the law of the place where the parties resided at the time of the marriage, or where they resided at the time when the right to pension accrued.

In that case the soldier had no knowledge of the existence of an impediment. In this case there is no evidence that soldier had any knowledge of the existence of an impediment, at least prior to his marriage in 1891, and that marriage is the only evidence tending to show knowledge on his part at that time. Without knowledge of the

impediment there could be no valid reason for new consent. As said in the *Palmer Case*—

Had the second husband known of the impediment to his marriage he could have repudiated and refused to recognize his marriage to claimant even after the death of said first husband. A relation which he could have elected to dissolve, had the facts been brought to his knowledge, he could not be said to have consented to when the knowledge of the fact was concealed from him. It does not appear that opportunity for consent was afforded after the removal of the impediment. So far as he was concerned the impediment was never removed prior to his death. Consent is an essential part of all marriage contracts, and the law marries no one against his or her consent. (Am. and Eng. Ency. of Law, vol. 14, p. 568, par. 6.)

In fact, the law never marries anyone, strictly speaking. The intent and acts of the parties under the law and in conformity with the law are necessary to constitute marriage. Marriage is a social domestic status, based upon contract, and consummated and controlled by law. The word contract implies a valid legal contract, and this implies that the parties to the contract must both be capable of contracting; and as the basis of the contract is a promise—i. e., consent—the parties to the contract must be legally competent to promise or consent. (Stuart on Marriage and Divorce, par. 46.)

The *Palmer Case*, while cited and approved in the case of *Margaret L. Thomas* (9 P. D., 139), yet the latter case drew a distinction between the innocent and guilty party, where the innocent party had no knowledge of the existence of an impediment.

This distinction can only properly apply to a case where the innocent party to the void marriage subsequently acquires knowledge of the existence of the impediment, and, after its removal, recognizes the marital relations by continuing cohabitation. Such continuous cohabitation and repute is frequently accepted by the courts as evidence of new consent, where the question involved is the right of such innocent party or their heirs. (1 Bishop on Marriage and Divorce and Separation, pars. 942 and 943, and cases cited.)

It was held in the case of *Catherine Conray*, docket No. 39864, decided April 13, 1899 (see L. B. No. 318, p. 9), that marriage in pension cases is to be proven under section 2 of the act of August 7, 1882, and that this Department will generally be guided, though not absolutely bound, by the construction placed upon the laws of a State by its court of last resort, following the rule adopted by the United States Supreme Court, and that any statement in the opinion in the case of *Margaret L. Thomas* (9 P. D., 139) which conflicts with this rule is modified to conform therewith.

So, also, it may be stated that it was not the intention in the *Thomas Case* to overrule the doctrine in the *Palmer Case* (7 P. D., 363), and any language used in said *Thomas Case* which implies such intent is hereby modified to conform with the doctrine in the *Palmer Case*.

In this case, as in the *Palmer Case*, the claimants alone are shown to have had knowledge of the existence of an impediment which rendered the first marriage void, and this knowledge was not brought to the attention of the soldier, *Palmer*, but he died in total ignorance of said fact.

So, also, in this case it is not shown that the soldier was advised of the previous marriage of his wife, and the only satisfactory evidence in this case of new consent is found in the ceremonial Michigan marriage of 1891.

The rule cited by claimant's attorney, from 1 Bishop on Marriage and Divorce, as announced in the case of Margaret J. Anderson (4 P. D., 67), is not followed by this Department in pension cases, and the Anderson Case was overruled in the case of Ann E. Server (7 P. D., 468). See also Louisa S. Hoepfner (9 P. D., 497); Elizabeth Schmidlin (6 P. D., 200), and Thankful Morse (1 P. D., 56).

As a legal marriage of claimant to soldier prior to March 19, 1886, is not proven in this case, the action appealed from is affirmed.

INSANE OR HELPLESS MINORS—ACT OF JUNE 27, 1890.

ELMER A. RODKEY (HELPLESS MINOR).

Claimant is unable to perform any manual labor, can not bear his weight upon the right lower limb, has lateral curvature of the spine, his right arm is atrophied and wasted away, he is slightly idiotic, and is unable to dress and undress himself.

Held, That he is so permanently helpless, within the meaning of the third section of the act of June 27, 1890, as to be entitled to a continuance of his pension as a minor under the provisions of said act.

Assistant Secretary Webster Davis to the Commissioner of Pensions, May 31, 1899.

James Rodkey having enlisted on September 15, 1862, in Company E, Eighty-fourth Pennsylvania Volunteer Infantry, died on August 17, 1864, while yet in the military service of the United States. His widow it appears remarried on March 1, 1866, having been borne upon the pension roll since the death of the husband. Soldier left also one minor child, Elmer A. Rodkey, under the age of 16 years who was pensioned under the general law until he arrived at the last-mentioned age on May 1, 1879, (certificate No. 109882).

On July 28, 1890, the minor, Elmer A. Rodkey, filed a declaration under the provisions of the act of June 27, 1890, seeking a continuance of his pension by reason of the fact that he is permanently helpless within the meaning of said act.

On December 23, 1896, his claim was rejected on the medical ground that claimant is not permanently disabled within the meaning of said act.

From said action appeal was taken on September 15, 1897, resting upon the contention that the medical evidence in the case and the certificates of medical examinations show claimant to be permanently helpless.

The claimant was subjected to a medical examination on August 5, 1896, at which time he was reported to be 33 years of age, with a fair

general appearance and soft muscles, a normal condition of the skin and tongue, and unimpaired mind. His physical affliction was said to be one of those peculiar and unexplainable conditions following scarlet fever. His right arm from the shoulder down to the elbow was atrophied and wasted away, measuring 3 inches less than the left. In view of existing conditions, say the medical board, the right arm is not of much use. The left hand is deformed and weak, having no power scarcely at all in the thumb. The right leg is about the size of that of a boy 12 years old, and is atrophied in its whole length from the hip to the foot, being 3 inches shorter than the left. He can wear a number 6 shoe on the left, and a number 3 on the right foot. The right thigh is 4 inches less in circumference than the left. The bilateral left chest measurement is seventeen and one-half, and the right fifteen and one half-inches. In the opinion of the board, it was almost impossible for claimant to dress or undress himself. There was considerable incoordination in all his movements. He walked with a cane, and in walking his right leg was of but little use.

Appellant was again medically examined on March 9, 1898. In addition to the objective conditions described in the former medical certificate, it was reported that his spine is curved laterally to right side to the extent of 2 inches in the dorsal and lumbar regions; that he is slightly idiotic, apparently from an early arrested development of mental faculties; that aside from this his mental condition is good; that he talks in a rational way, except "that he places stress upon matters which he considers a joke or something humorous;" that he is totally unable to perform manual labor, but could perform mental work; that he can not bear his weight on his right lower limb, and his right arm is impaired at least three-fourths.

The advisory opinion of the medical referee is as follows:

This minor's claim was rejected on December 23, 1896, "claimant not permanently disabled within the meaning of the act."

Since this rejection and the filing of an appeal, another medical examination has been made. The "child" has not been shown to be insane or idiotic. The board expressed the opinion that "he could perform mental work."

He had an atrophied condition of the muscles of the right side of body, arm, and leg, with shortening of the right leg, and considerable weakness of the arm and leg. The board states that aid and attendance is needed "to assist him to put on his clothes." He is unable to perform manual labor, but the report does not show him to be insane, idiotic, or otherwise permanently helpless, and it is believed that the rejection of the claim is correct.

The beneficent provision of the third section of the act of June 27, 1890, as it relates to the continuance of a minor's pension beyond the age of 16 years, applies to such as are "insane, idiotic, or otherwise permanently helpless." This language manifestly includes every condition of permanent helplessness which is not the result of vicious habits. From a careful consideration of the objective conditions disclosed by medical examinations I am not able to discover wherein the

claimant is not permanently helpless in the sense contemplated by the statute. He is certainly unable to perform any manual labor; he can not bear his weight upon the right lower limb and his right arm is atrophied and wasted away; he has lateral curvature of the spine and is slightly idiotic, apparently from early arrested development of his mental faculties; he can not dress or undress himself, yet he is declared by one medical board to be able to perform mental work. It is not stated, nor does it appear from the testimony, in what manner of intellectual pursuit he could earn a salary sufficient to pay even for being dressed and undressed by some other person. There must be some sort of physical basis as a necessary condition to make any character of "mental work" available in the struggle for bread. In what field of mental industry can this man, with a dwarfed and impaired mental caliber, who is physically unable to dress himself, hope to obtain employment that will remunerate him with even the scantiest means of existence? A soldier in his condition would be pensionable at the rate of \$50 per month under the general law, if not \$72 per month, no matter what his mental status might be. The pension laws generally deal with the physical, not mental, conditions. It is true that insanity may produce a pensionable status, but the reason for such a provision lies in the fact that mental incapacity results in physical inability. Any degree of mental impairment which does not work a resulting incapacity for the intelligent performance of manual labor is not regarded in estimating the rights of an applicant under any pension law.

There are two other statutes which deal with physical conditions defined to be total and permanent helplessness. The act of June 18, 1874, provides a pension of \$50 per month for such pensioners under the general law as have been, by total blindness, the loss of both hands or both feet, or any other injury, rendered permanently and totally helpless, requiring the regular personal aid and attendance of another person. In an application seeking the benefits of this statute no degree of mental ability or power of intellectual achievement would work any detriment to the status of the beneficiary. The same criticism is true of any case arising under the act of March 4, 1890, which provides a pension of \$72 per month by reason of a condition of total and permanent helplessness, resulting from injuries received or disease contracted in the service.

By construing the acts of June 18, 1874, and of March 4, 1890, in *pari materia* with the act of June 27, 1890, as to the use of the term "helplessness" or "helpless," I can not escape the conviction that it is used in the same sense in all of them; that is, that said term primarily signifies a condition of physical impairment. It will be remembered that this is a general-law claim under section 4702, Revised Statutes, and the provision in the act of June 27, 1890, relating to the continuance of a minor's pension under the general law is an amendment of said section and is to be construed with it as one statute. As the law now stands, therefore, as embodied in the two above-mentioned acts, and

in section 4702, Revised Statutes, physical helplessness, other conditions being present, may give rise to a pensionable status regardless of mental conditions.

The act of June 27, 1890, in the case of minors, provides for the continuation of the pension where there is shown to be a degree of permanent helplessness resulting from insanity, idiocy, or from any other cause. The provision is "That in case a minor child is insane, idiotic, or otherwise permanently helpless," etc. Here are three separate and distinct sources of helplessness enumerated by the statute which may produce a pensionable status. The first two are mental conditions; the last is purely a physical one. Unless the phrase "or otherwise permanently helpless" is senseless and meaningless, it has reference to a condition resulting from physical causes. The phrase is placed in juxtaposition with the words "insane" and "idiotic," not by way of apposition, but by contrast. The plain and obvious meaning of the statute is that a helpless minor may be entitled to a continuance of his pension by total insanity or total idiocy, or by reason of total helplessness resulting from purely physical causes, without regard to his mental condition. If it be incumbent upon an applicant, not only to show physical helplessness, but also to establish mental unsoundness, then a purely physical condition would never play any material part in obtaining the continuance of a minor's pension.

After a careful consideration of all the papers in the case, I am led to the conclusion that the action of rejection was erroneous, and, for reasons hereinbefore mentioned, the same is reversed, with instructions that the claim be readjudicated in accordance with this opinion.

MARRIAGE AND DIVORCE—LEGITIMACY.

ALLEGED MINORS OF JONAS W. PULVER.

1. A common-law marriage is good in the State of Wisconsin. A marriage in Wisconsin when one of the parties has an undivorced living husband or wife is void. After such impediment is removed a new relation must be shown to have been entered into as a fact; otherwise the continuance of the cohabitation will be presumed to be illicit. (Williams v. Williams, 46 Wis., 464.)
2. Children born of a marriage null in law are legitimate in Wisconsin. (Sec. 2274, R. S. Wis., and Watts et al. v. Owen, 62 Wis., 512.)
3. Such fact does not, however, give them a pensionable status, for a pensionable status is to be determined wholly by the laws of the United States, which limits a minor's title to one which was, or could have been, in the legal wife (widow). (Sec. 4702, R. S. U. S., as amended.)

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
May 31, 1899.*

Alice Lowth, as guardian of John M. and Minnie, minors of Jonas W. Pulver, formerly a private in Company K, Thirty-second Wisconsin Volunteer Infantry, filed an application under the general law on

September 13, 1886, claim being rejected on February 23, 1897, on the ground that there was no title in the said minors. An appeal filed on March 2, 1898, contends that rejection is contrary to law.

The facts in this case are as follows: Sophronia Green was married to William Shane on the 5th day of June, 1858, at Westford, Dodge County, Wis., by one David Blunt, presumably a justice of the peace. The legality of this marriage is neither questioned nor doubted, and its solemnization is a matter of record in the office of the secretary of state in the State of Wisconsin, a transcript of the necessary record being on file in this claim. On November 14, 1861, this Sophronia, under her maiden name of Green, was married to Jonas Pulver, at Oconomowoc, Waukesha County, Wis., under the rites of the Congregational Church, said marriage being of record in said county, a transcript of the record being on file herein. It appears by reliable evidence that Pulver and Sophronia lived together, cohabiting as man and wife, from the date of their attempted marriage up to the day of the death of Pulver, the soldier, which occurred on March 8, 1884, there being two children born to them, who were under the age of 16 years at the father's death. The widow, Sophronia, remarried in one year, this time to one Jacob R. Stilson. She died on May 14, 1894, and it is admitted that the former husband, Shane, was living and undivorced at the date of the celebration of marriage with Pulver.

This claim has been prosecuted for the benefit of the two children mentioned, and it is contended in their behalf that notwithstanding the admitted impediment which existed at the date of the attempted marriage of their mother with soldier, yet said marriage was a good and valid one, and the children are legitimate, made so in any event by the statutes of Wisconsin. It is thus seen that two distinct issues of law are presented, the appellant maintaining the affirmative: First, a marriage celebrated when one of the contracting parties is not legally competent to marry is not necessarily invalid for all time; second, if a child born of such marriage is legitimate, he has a pensionable status under the general law.

The statutes of the United States allow a marriage, in pension cases, to be proven as a legal marriage "according to the law of the place where the parties resided at the time of marriage" (section 2, act of August 7, 1882), and the first proposition in the appeal will be discussed wholly as to whether or not the marriage in question was or ever became a legal one in the State of Wisconsin.

It may first be said as an indisputable statement of the law that a marriage celebrated or entered into when one of the parties has a living undivorced husband or wife is a void marriage; not merely voidable, but absolutely null and void. (Stewart on Mar. and Div., in secs. 76 and 132, and cases cited.) I may add that no decision by any appellate court in any of our States appears to have ever been rendered to the contrary. Now, while this must be accepted as a legal proposition, it is not to be denied but that the courts in some States of the Union

have gone to great length in upholding a ceremonial marriage on the grounds of public policy, a previous marriage having been contracted, even although it became necessary thereby to presume either the death of one of the parties or their divorce. Especially is this true in cases where the contracting parties have lived in a matrimonial relation for a considerable term of years and children have been born as a result of such relation. In this connection I am convinced that under the act of August 7, 1882, this Department is in duty bound, so far as is possible with sound reasoning, avoiding clear infractions of the law, to follow the decisions of the appellate courts of the several States where such an issue is involved. (See case of Frederick Kent, 10 P. D. 211.)

As stated, the courts of some of our States have gone to great length as to the principle involved herein, but a reference to the opinions rendered by the supreme court of the State of Wisconsin shows that court not to be one of the number. The issue involved in the case at bar is definitely discussed in the case of *Williams v. Williams* (16 Wis., 464), the facts being as follows: Jane, the lawful wife of one William Jones, was married to Lewis Williams on the 9th day of May, 1870, said William Jones being alive and undivorced from said Jane at the time. In the month of November, 1870 (six months after the marriage of Jane and Williams), she was lawfully divorced from Jones in Kenosha County, Wis. Williams died on August 20, 1873, and in a suit for dower instituted by Jane, the purported wife, the question of the legality of her marriage with Williams came before the supreme court. The issue was very thoroughly discussed, and, without quoting at too much length from the opinion rendered in the case, it may be stated that the court laid down the following propositions:

The general and ordinary presumption of the law is in favor of innocence, in questions of marriage, and of legitimacy where children are concerned. Cohabitation is presumed to be lawful until the contrary appears. Where, however, the connection between the parties is shown to have had an illicit origin, and to be criminal in its nature, the law raises no presumption of marriage.

The court, after stating the above to be sound doctrine and citing authorities in support of it, went on to state:

The presumption against marriage, where the connection between the parties is shown to have been illicit in origin, may, however, be overcome by proofs showing that the original connection has changed in its character, and a subsequent marriage may be established by circumstances without actual marriage in fact.

The court did not hesitate to adhere to this doctrine as sound in the abstract, and quoted authorities for the same, largely from the opinions of the court of appeals in the State of New York. But, in order to further exemplify their views in regard to the character and degree of proof necessary in their opinion in such cases, they adopted the rule laid down in *Foster v. Hawley* (8 Hun., New York, 68), which reads as follows:

A cohabitation illicit in its origin is presumed to be of that character unless the contrary be proved, and can not be transferred into matrimony by evidence which falls short of establishing the fact of an actual contract of marriage. Such contract

may be proved by circumstances, but they must be such as to exclude the inference or presumption that the former relation continued, and satisfactorily prove that it had been changed into that of actual matrimony by actual consent.

Applying this rule to their own case, the court summed up, as to the appellant, that if—

* * * she claims a lawful marriage with such deceased after her divorce, and after she had thereby acquired the right to become his wife, she ought to be required to establish the fact of such subsequent marriage, either by express proof of the contract of marriage or by circumstances which would clearly exclude the presumption that she continued to live with him under such illegal contract of marriage.

Two things of great importance in the adjudication of pension cases are deducible from the above. First, a common-law marriage is good in the State of Wisconsin. Second, a marriage entered into in the State of Wisconsin, either of the contracting parties having an undivorced living husband or wife, is void ab initio. The relation is illicit, and will be presumed to so continue unless after the impediment has been removed a new relation is shown to have been entered into as a fact. This holding is in consonance with the holdings in the great majority of the States of the Union. It needs no argument to prove that in such a case neither death nor divorce would be presumed in Wisconsin, when their supreme court refuse to hold such a marriage legal even after a divorce was actually shown.

Applying, then, the doctrines and principles of the Wisconsin supreme court to the facts in the case under review, I hold: The mother of the minors herein was never the widow or the legal wife of Jonas W. Pulver.

This conclusion brings us to the second proposition in the appeal, viz: If a child born under such a marriage as has been recited is, for any reason, held to be legitimate, such child has a pensionable status under the general law.

That children born to Joseph Pulver and Sophronia, his purported wife, must, at this point, be concluded to be illegitimate, can not be successfully denied; for such children were the fruit of an illicit and unlawful intercourse. Moreover, the supreme court, in the case of *Watts et al. v. Owens* (62 Wis., 512), have virtually sustained the common-law rule as to children born of a void marriage. But the statutes of Wisconsin have altered the common law in this respect, and, as stated in the *Watts Case*, *supra*, which interpreted section 2274 Revised Statutes, Wisconsin, as follows:

It means just this and nothing else: That a child born within the wedlock of a regular marriage, which is null in law, shall, nevertheless, be the legitimate child and heir of each and both parents so far as the question of legitimacy is concerned.

The section referred to reads:

The issue also of all marriages declared null in law shall, nevertheless, be legitimate.

So far, then, as the question of the legitimacy of the minors herein is concerned, under the statutes of Wisconsin, there can be no discus-

sion. They are unquestionably legitimate, and are heirs of both their parents. But the question of a pensionable status of said minors is quite another matter. The pensionable status of any person is determinable wholly by the laws of the United States, the laws of a State having effect only so far as the United States statutes authorize them to be effective. As far as a marriage is concerned, we have already seen that section 2 of the act of August 7, 1882, declares that a marriage in pension cases may be proven according to the laws of the State wherein the parties resided, but it says nothing regarding the pensionable status of children born of such marriages. In fact, the only parts of the acts of Congress which have to do directly and expressly with the legitimacy of children, so far as their pensionable status is concerned, are sections 4704 and 4705, Revised Statutes. Section 4704 legitimizes children born before wedlock, but acknowledged by the father, and section 4705 has to do only with children of colored and Indian soldiers. Neither of these sections, it is seen, have any bearing upon the issue herein. It could be very reasonably and logically argued by implication and inference, and I doubt if the reasoning could be successfully overthrown, that a marriage shown to be void under the act of August 7, 1882, which fact denied the pensionable status of an alleged widow, would also deny the pensionable status of a child born of such a marriage. It would seem to be impossible to reach any other conclusion. We are not, however, forced to reason from implication and inference, which is often debatable ground, for the statutes clearly define the title of a minor to a pension under the general law.

Section 4702, as amended (being an act approved August 7, 1882), places title, on the death of the soldier, in the widow, section 4703, adding to amount allowed the widow \$2 for each child under 16 years. If there is no widow (death or divorce before the death of the soldier would make such a condition), then the title is placed in the minors. But note well that under such circumstances title is in the minors for the sole reason that there is no widow; and further, that there must at some time have been a legal wife, in whom, but for the happening of a certain event, the title would be, and that it is this title the minors take. If the widow dies without payment of pension to her or remarries, or (section 4703) is "deprived of her pension under the provisions of the pension law," then title is placed in the minors. It is thus seen that the foundation of the title, so far as a minor is concerned, is in the widow; that is, in the wife of the soldier who is the mother of the children in question. The title does not shift to the children only upon the happening of certain events to the widow and mother. If there is no widow, if there has not been a legal wife, how shall there be any title in the children? The foundation of the children's title is in their mother, the widow, the minors' interest being but a part of the superstructure. Now if the alleged widow, their mother, never had or could have a title, the foundation has gone, and there is nothing on which to

build a title for the children. A right can not be built upon a title that does not and could not exist.

The pension laws are silent upon legitimacy as affecting the title to a minor's pension, save as hereinbefore stated, which laws, it is seen, have no bearing upon the issue herein. A pension is a public grant, and can be allowed only to those individuals whom the statutes clearly and expressly embrace. State laws as regards legitimacy are of no avail, unless the United States Statutes plainly allow them to control, which they do not. A minor must claim, if at all, through the title which would have been, but for the happening of certain events, in the widowed mother. If this mother never had or never could have title, it is impossible to discern the rights to title in her children. I reiterate that you can not successfully claim a right through a title that never could have existence.

The minors in this case are not legitimate under the common law, for the reason that their mother was not the legal wife of the soldier, and consequently never was his widow. The alleged widow not having, and it not being possible for her ever to have had, a title to pension, her children, although the offspring of the soldier, can have no title; their title being dependent upon her title, and her title being nil, theirs must be the same.

The action appealed from is affirmed.

INCREASE—DESERTION—RES JUDICATÆ.

WILLIAM WILSON.

Pensioner is in receipt of pension at \$17 per month, for rheumatism and resulting disease of heart. This pension was granted when the rules of practice recognized his service as legal. Since then a change in said rules and in the construction of the law would not permit the allowance of said pension *de novo*, because the service is considered as nonpensionable. But, under the "general instructions" in regard to practice in the Bureau, it is provided that the pension as granted shall not be disturbed as to title, but no additional pension, either as increase or for new disability, may be allowed. Hence this claim for increase of rating was rejected.

It is *held*, that while the "general instructions" are proper and sustained by former decisions as regards original title, yet as long as his name is kept on the rolls he is entitled to increase of rating upon a proper showing of increase of the disability for which pensioned. The rejection is accordingly overruled.

Assistant Secretary Webster Davis to the Commissioner of Pensions, June 8, 1899.

William Wilson, late of Company L, Sixth Missouri Cavalry, is pensioned at \$17 per month, on account of disability from rheumatism and resulting disease of heart. In a claim for increase, filed April 1, 1897, he alleged resulting general debility and disease of eyes. This claim was rejected July 21, 1898, on the ground that claimant was a deserter

from Company A, Sixth Missouri Cavalry, and under existing rules title to original pension could not be granted upon the facts shown, and therefore an increase of pension or an additional allowance on the same basis is not warranted. From this action an appeal was made August 8, 1898, in which it is stated by appellant that the charges of desertion against him, on which this rejection was based, had been removed, of which fact he could furnish proof if necessary.

The original claim of this appellant was filed May 24, 1883, and alleged rheumatism contracted about December 31, 1863, while serving in Company L, Sixth Missouri Cavalry.

This claim was at first rejected April 2, 1886, because his service in said organization was not legal or in line of duty, as he had enlisted therein in violation of the Articles of War, being at the time a deserter from another regiment. Upon a change being made in the construction of the law the claim was subsequently allowed November 30, 1887, at the rate of \$4 per month. Claims for increase being made from time to time, the rating was advanced to \$6, to \$10, to \$16, and to \$17 per month, which he is now receiving. In none of these claims for increase, nor in others rejected because no increase of disability was shown, was any point made on the illegality of pensioner's service, as in the case under consideration. The basis of the action appealed from is the record of pensioner's service as contained in the reports of the War Department, which show the following:

William W. Wilson, private, Company A, Dade County Cavalry, subsequently Company A, Sixth Missouri Cavalry, was enrolled July 5, 1861, for three years; on roll of company dated September 1, from July 5, 1861, absent without leave; name not borne on subsequent rolls of company.

William W. Wilson, private, Company E, Fourteenth Missouri State Militia Cavalry, was enrolled March 24, 1862, for the war, and is reported on rolls of company from enrollment to June 30, 1862, present; July and August, 1862, absent at Springfield; September and October, 1862, not on file; January and February, 1863, present.

Roll of Company E, Eighth Missouri State Militia Cavalry (to which transferred), reports him, April 10, 1863, special muster, present; same to April 30, 1863; May and June, 1863, deserted May 23, 1863; name not borne on subsequent rolls of company to muster-out roll, which reports him deserted.

This man, while a deserter from this organization, enlisted in Company L, Sixth Missouri Cavalry, in violation of the twenty-second article of war.

William Wilson, private, Company L, Sixth Missouri Cavalry, was enrolled May 27, 1863, as recruit for three years, and is reported on roll of company May and June, 1863, present; same to August 31, 1865; mustered out with company September 12, 1865.

In a later report, referring to pensioner's enlistment in Company E, Fourteenth Missouri State Militia Cavalry, and in Company L, Sixth Missouri Cavalry, it is stated:

This man, under the name of William W. Wilson and William Wilson, respectively, deserted from Company —, Captain Switzler's Dade County Cavalry, about September 1, 1861, and enlisted in this organization, in violation of the twenty-second (now fiftieth) article of war. This office can not recognize the legality of this enlistment, nor any claim for service rendered thereunder. The law views him as in a continuous state of desertion during the whole period of his enlistment.

As before indicated, this pension was allowed in November, 1887, upon the theory that the last service was separate and distinct from those preceding (which were tainted by charges of desertion), and since the record showed faithful service throughout, and an honorable discharge from, this last term of enlistment, title was considered established. Being once allowed, no question appears to have been raised as to the title until the last claim for increase was filed. And even now the rejection does not go to the extent of denying that the original and subsequent grants were legal and proper at the time made, but only determines that as the rules (of practice) now exist such original grant could not be made, and no further increase of rate is warranted, whatever the degree of disability. The effect of this action is to continue pensioner on the rolls at his present rating, even though the pension is not one that could be properly allowed *de novo*. The authority for this action, or the rule referred to, is contained in the "Treatise on the Practice of the Pension Bureau," under the title, "General Instructions, section 1," on page 117, as follows:

When a claim for pension was allowed under the practice prevailing at the time of its allowance, and there is no evidence of fraud or mistake of fact, such adjudication will not afterwards be disturbed for the reason that such practice has been abrogated or modified by subsequent rulings or decisions.

This rule applies to questions of original title to pension and not to the rate of pension.

If, however, in such cases an application is filed for increase or additional allowance of pension upon the same basis as the original allowance was made, such application will be rejected on the ground that under existing rules title to original pension could not be granted upon the facts shown, and therefore an increase of pension or an additional allowance on the same basis is not warranted.

Here, as will be observed, it is held in the first paragraph that although pensioner was a deserter from two services when he enlisted in 1863 in Company L, Sixth Missouri Cavalry, yet, under the rules of practice in 1887 pension was allowable for disability contracted in said service; and although under the change of rules, and as at present existing, such allowance would not be permissible, because the service is regarded as nonpensionable, yet the former adjudication should not be disturbed, but pensioner may continue to receive his pension already granted. This instruction is founded in good policy and is sustained by long-established rulings in similar cases, as will be seen in the following references:

The interpretation of a law given by the competent authority having jurisdiction of the subject can not be revised or reversed by his successor in the same office so as to affect the rights of those who have received pensions under the first interpretation, although such construction should be deemed by the successor in office erroneous; but the case would be different if any mistake of fact had been committed or the Government imposed on by false testimony. (Attorney-General Taney, 2 Op., 532.)

Where claims have been adjudicated by former administrations under a provision of law in regard to which different opinions have been held, it is not proper to disturb such original action, and title to pension in such cases will be considered as finally adjudicated. (Jacob Nix, 4 P. D. (o. s.), 260.)

Where the right to pension has been determined by this office in 1866, and the allowance of the same was not disturbed in the adjudication of applications for increase in 1872 and 1879, and no evidence having been presented to alter the facts as they existed at the time of the original adjudication or to show that the action then taken was based upon any false or fraudulent representations on the part of the claimant, the propriety of the original allowance of pension should not now be questioned (in an appeal in a pending claim for increase). (Alfred Kite, 9 P. D. (o. s.), 232).

The second paragraph declares that this rule applies to questions of original title to pension and not to rate of pension. That is to say, that while the original grant of pension, made as above, will not be disturbed, yet the rate may be. It is well known that where error in a former rating is manifest it will be corrected. There have been many cases of rerating upon a proper showing made. But even in these cases former ratings were changed only when there was positive evidence that a mistake had been made, either of law or fact, and not upon a mere question of judgment.

But the third paragraph of the section appears to go too far and contains a ruling inconsistent with those above mentioned, in that it denies the right of pensioner to any increase of rating for the disabilities on account of which he is allowed to retain his pension. In other words, it would seem that if pensioner is permitted to continue on the rolls as to disabilities originally admitted, he can not very well be refused an increase of rating when the same disabilities are shown to have increased in degree. Such refusal would not be in consonance with the statement in the second paragraph that the rate of pension is not involved in the rule, nor with the general right to increase, which is implied in the granting of original pension for nonspecific disability, when increase in the degree of disability is shown.

That portion of the paragraph which declares that no additional allowance of pension would be made upon the same basis as the original allowance—that is, that no pension for a new and separate disability contracted in the service not recognized as legal would be granted, under existing rules—may be said to be altogether correct and tenable, because the right of each administration to construe the law and formulate its own rules of practice is recognized as inherent and justifiable, provided the consistency of such rules with the law and with each other is preserved. But this is very different from the right to deny increase of rating for increase of disability, as long as the original adjudication remains undisturbed and pensioner's name is kept on the rolls. In so far as this is done it is believed to be inconsistent and the instruction to that end is untenable.

But there is another phase of the case which arises from appellant's assertion that the charges of desertion against him had been removed, as he can show. It is recognized, of course, that he is probably mistaken in this, as the reports from the War Department make no mention of the fact. His full statement in the appeal is as follows:

I never did belong to Company A, Sixth Missouri Cavalry, but I did belong to Capt. Theodore F. Switzler's Dade County Home Guards. After the battle of Wil-

sons Creek we fell back to Rollo, Mo. One morning Captain Switzler and Captain Wright called me and others to their tent and told us we were not legally mustered into the service, and to go where we pleased and enlist where we pleased, and I did it. This thing came up in my original pension, and through the Hon. F. M. Cockrell, United States Senator, that charge was removed. I have a discharge from that organization, and I also have a discharge from the Eighth Missouri State Militia Cavalry, and I also have a discharge from Company L, Sixth Missouri Cavalry. That has arisen twice and has been settled satisfactorily by the Secretary of War.

In view of this statement it would seem to be proper to call upon claimant to furnish the discharge referred to, with such other data as he may have relative to removal of the charges of desertion, and another report from the War Department should be requested. It may be possible that appellant is correct, and that his title can be freed from the cloud upon it, thus rendering the intervention of the instructions unnecessary. The making of these calls, as suggested, is not imperative in the determination of the present issue, but they might at least prove satisfactory in settling any future claim that may arise in which the legality of pensioner's service is involved.

In the matter now in issue, which is simply pensioner's right to have his claim for increase considered on its merits, the action of the Bureau is overruled for the reasons heretofore set forth, and if the evidence, including the certificate of medical examination, shows him entitled to a higher rate of pension for the disabilities now covered by his certificate, or legitimate results thereof, such increase should be granted. The papers are accordingly returned for readjudication on the line indicated.

ATTORNEYS—RECOGNITION—ACT MARCH 3, 1899.

WIFE OF HIRAM A. DAVIS (CLAIMANT).

MILO B. STEVENS & CO. (ATTORNEYS).

In a claim under the provisions of the act of March 3, 1899, an attorney is entitled to recognition upon filing proper evidence of his authority to prosecute said claim.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
June 10, 1899.*

On April 17, 1899, an appeal was entered from the action of the Bureau in the matter of recognition in the claim of Margaret E. Davis, under the act of March 3, 1899, as wife of Hiram A. Davis, Company E, Eighty-eighth Pennsylvania Volunteer Infantry.

These appellants have secured a power of attorney from the claimant and in her behalf have filed an application for payment to her of one-half of her husband's pension under the provisions of said act. They were advised that they could not be recognized as attorneys in said claim "for the reason that the services of attorneys are not required in these cases, and no fees will be paid."

In connection with the reasons assigned for refusing to recognize the appellants it is stated that blank applications are sent by the Bureau to persons desiring to avail themselves of the provisions of the act, and that the calls upon applicants in the several classes of cases are full and explicit as to what evidence is required.

Such is the practice in all classes of claims filed in the Pension Bureau, yet fees are paid to attorneys for their services in all those classes of claims where any services are required. It is manifest from the call for evidence issued by the Bureau that a great deal of service is required in the claims under the act of March 3, 1899, before said claims can be allowed. Furthermore, it is quite reasonable to suppose that nearly all these claims will be contested, that attorneys will be employed by both parties, and it may reasonably be anticipated that a greater amount of proof will be required where there is a contest than there would be in claims where a party is only required to file evidence that prima facie shows the facts specified in the several acts granting pensions to soldiers and to those dependent upon them. It is not presumed that the Bureau has the requisite knowledge for the purpose of making calls for evidence necessary to establish the *res gestæ*, the fact that the pensioner deserted the claimant, in claims under said act, until the claimant has advised the Bureau in each particular case. By the call referred to, a claimant is notified to file evidence showing " * * * that he (soldier) deserted you for a period of six months or more." Now what light is afforded a claimant as to what constitutes desertion and as to the competency of witnesses necessary to show the fact? Certainly it is not seriously intended to accept a mere recitation by some person or persons who may or may not be interested, under oath, that "claimant's husband deserted her" as sufficient to prove the fact of desertion. There are persons skilled in the law who are able to decide upon the competency and sufficiency of evidence; claimants under said act are privileged to have recourse to such persons for all purposes relative to their claims thereunder. Not only may an attorney be recognized in claims under said act, but in view of the fact that contests are liable to arise in all claims thereunder between the pensioner and the claimant, it is deemed that attorneys are essential, and that by refusing to accord to either a pensioner's or a claimant's attorney recognition in such claims said parties are deprived of their privileges as citizens without any warrant or cause therefor.

Not only are attorneys necessary and essential for the proper prosecution of the claim, and hence entitled to recognition, but it is submitted that in many instances that may arise it would, in view of the fact that the Bureau is to pass upon the preponderance of the evidence touching a particular fact or facts relative to the question of desertion, be a question of propriety for the Bureau to inform either the claimant or the pensioner as to the sufficiency or kind of evidence required. It will be remembered that the effect of the judgment of the Bureau if favorable to the claimant is not a disposition of Government funds, but of the

pensioner's property, and that due regard must be had to every safeguard the law throws around a person in the protection of his rights. To deprive a claimant of the right to prosecute or a pensioner to defend his cause, in personam or through the services of a competent attorney, would be an act in utter disregard of principles upon which depend all the privileges conferred by the law.

For the foregoing reasons the action of the Bureau in denying appellants' recognition in the above-entitled claim is overruled, it appearing that they have been duly authorized to prosecute such claim and no other attorneys having prior rights.

MARRIAGE AND DIVORCE—DECREE OF NULLITY.

SALLY A. FULLER (ALLEGED WIDOW).

Claimant, at the time she married the soldier, had a former husband living, from whom she had not been divorced. Subsequent to the death of her second husband, the soldier, she procured a decree in the supreme court of New York annulling said first marriage on the ground that claimant had not attained the age of legal consent at the time said marriage was consummated.

Held, That under the laws of New York, and by the terms of said decree, such decree became effective only from the date thereof; and it appearing by the evidence that claimant and her first husband cohabited as husband and wife after she had arrived at the legal age of consent, she was his legal wife at the time she married the soldier and remained such up to the date of the decree of nullity before mentioned, and therefore was never the legal wife of the soldier, and is not his lawful widow.

Assistant Secretary Webster Davis to the Commissioner of Pensions, June 20, 1899.

This appellant, Sally A. Fuller, on August 13, 1892, and September 11, 1896, filed claims No. 557,154 for pension under the act of June 27, 1890, as the widow of William Fuller, who was a member during the war of the rebellion of Company L, Ninth New York Cavalry, and of Company E, Fourteenth New York Heavy Artillery, and died March 26, 1892.

The first claim was rejected October 1, 1895, on the ground that claimant is not the legal widow of the soldier—

it being shown by special examination that she had a husband living from whom not divorced at time of marriage to soldier. It also appears that said first husband survived the soldier.

The second claim was rejected June 7, 1898, also on the ground that claimant is not the soldier's legal widow—

her former marriage not having been annulled prior to the death of the soldier. (See opinion of the chief of the law division, May 31, 1898.)

From this action she appealed August 26, 1898, contending:

First. The claimant Sally Ann Fuller's marriage with Fairbanks was declared null and void by the supreme court of the State of New York, for the reason that at the time of her marriage she was an infant, under 14 years of age, and could not legally marry, unless by consent of parent, which the evidence in the case shows she did not have.

Second. This marriage was annulled and declared void by the supreme court; therefore by the statute of the State of New York it is conclusive evidence of the invalidity of the marriage. (See Code of Civil Procedure, section 1754.)

In the case of *Price v. Price* (124 N. Y., 598), the court of appeals hold that where a marriage was held null and void, the children were illegitimate, and it had the same effect as though a marriage had never been entered into.

Therefore there is no sound reason in the grounds the Commissioner has taken "that the marriage was not declared null and void before the soldier's death," for the reason, the cases hold, when the marriage is once annulled, it is as though it never had been, and is void *ab initio*.

The opinion by the chief of the law division of the Pension Bureau sets forth quite fully the facts in this case, including a copy of the decree above referred to, and is as follows:

Herewith are returned the papers in the above-mentioned claim. The case was sent to the law division for the purpose of an opinion as to the legality of claimant's marriage to the soldier.

The case has been the subject of a special examination, and the evidence elicited thereby may be briefly summarized as follows:

The claimant and the soldier were married in New York on June 13, 1866, and lived together as husband and wife up to the soldier's death, which occurred March 26, 1892, a period of twenty-six years; that claimant's maiden name was Sally Ann Sprague, and she was first married to one George Fairbanks when a schoolgirl of 13 years of age; that she had seen him but two or three times before they were married; that she did not know enough of him to know whether he had been married before or not; that after they were married they went to her sister's house and stayed one night; that he then went away and was gone a year, during which time she did not hear from him; that he came back and they lived together about one week; that he said he was a deserter and had to go away, and was going to enlist in another regiment; that she never heard from him afterwards until her child by Mr. Fuller was 6 months old; that was twenty-one years ago; he came to her house, but said nothing about having been her husband; did not seem to want her, and said he had another woman; that he has never been seen since by claimant, but others have since seen him; that she never obtained a divorce from him or he from her, so far as she knows.

The testimony taken by the special examiner did not satisfactorily establish whether claimant's marriage to Fairbanks took place before she was 16 years of age, or, if so, whether it was confirmed by cohabitation after she became 16, nor whether Fairbanks had been absent five successive years before she married Fuller. The witnesses examined had no definite information in regard to the date of her marriage to Fairbanks, and her own age was not fixed with certainty. The inquiry was not prosecuted in these respects, nor in respect to the validity of claimant's marriage to Fairbanks. It was disclosed that he was a roving person, with different alleged wives.

The claim was, however, on October 1, 1895, rejected on the general ground that when claimant married the soldier he had another wife living and undivorced, and was reopened upon claimant's filing the following decree of nullity granted by the supreme court of St. Lawrence County, N. Y., on April 20, 1896, which appears to recite on its face the jurisdictional facts necessary under the statutes of New York to give the court jurisdiction of the defendant:

"At a special term of the supreme court, held at the chambers of Hon. L. W. Russell, at the village of Canton, N. Y., on the 20th day of April, 1896.

"Present: Hon. L. W. Russell, supreme court, St. Lawrence County.

"Salley A. Fairbanks agt. George Fairbanks.

"On filing due proof of publication of the summons in this action, and more than twenty days having elapsed since the completion of said service, and due proof by

affidavit that the defendant has not appeared in this action, and the court having taken proof of the facts mentioned in plaintiff's complaint,

"It is hereby ordered, on motion of Joseph George, attorney for plaintiff, and it is hereby adjudged that the marriage contract between plaintiff, Salley A. Fairbanks, and the defendant, George Fairbanks, be, and the same is hereby, declared void and that the marriage between the said plaintiff and the said defendant be, and the same is hereby, annulled from date of this judgment, because the plaintiff had not attained the age of legal consent at the time of such marriage, and that the parties plaintiff and defendant are free from the obligation of marriage with each other.

"And it is further adjudged that the defendant pay the costs of this action.

"Enter.

"LESLIE W. RUSSELL, J. S. C.

"Ent. April 21, 1896."

"STATE OF NEW YORK, *St. Lawrence County Clerk's Office, ss:*

"I, James E. Johnson, clerk of the county of St. Lawrence, and clerk of the supreme court in and for said county, and keeper of the records of conveyances of said county, and keeper of all the records of said court in and for said county, do hereby certify that I have compared the foregoing with the original judgment roll entered April 21, 1896, in this office, and that it is a correct transcript therefrom and of the whole of said original.

"In testimony whereof I have hereunto set my hand and affixed the seal of said county and courts at Canton, N. Y., this 26th day of December, A. D. 1896.

[SEAL.]

"JAMES E. JOHNSON, *Clerk.*"

"STATE OF NEW YORK, *Supreme Court Chambers, ss:*

"I, Leslie W. Russell, one of the justices of the supreme court of the State of New York, in and for the Fourth judicial district thereof, and, as such, a presiding justice of the supreme court in and for the county of St. Lawrence, do hereby certify that the foregoing exemplification of judgment roll is made by the proper officer and in due form, and in such form is entitled to be read in evidence in any of the courts of this State.

"In testimony whereof I have hereunto set my hand and caused the seal of said courts to be affixed this 26th day of December, A. D. 1896.

[SEAL.]

"LESLIE W. RUSSELL,

"*Justice of the Supreme Court.*"

"STATE OF NEW YORK, *St. Lawrence County Clerk's Office, ss:*

"I, James E. Johnson, clerk of the county of St. Lawrence and clerk of the supreme court, circuit court, and court of oyer and terminer, in and for said county, do hereby certify that Hon. Leslie W. Russell, whose name is subscribed to the foregoing certificate, was, at the date thereof, one of the justices of the supreme court of the State of New York, in and for the Fourth judicial district, duly elected and qualified, and, as such, a presiding justice of the supreme court in and for said county; and that I am well acquainted with the handwriting of said Leslie W. Russell, and verily believe that the signature to said certificate is genuine.

"In witness whereof I have hereunto set my hand and affixed the seal of said county and courts at Canton, N. Y., this 26th day of December, A. D. 1896.

[SEAL.]

"JAMES E. JOHNSON, *Clerk.*"

In view of these facts, the question is presented whether it is possible for claimant to prove a valid legal marriage to the soldier.

In this case it is clearly and incontestably shown by the evidence that the claimant married one George Fairbanks in New York some time in 1862, and although she alleges that she was but 13 years of age at the time, yet the fact of her age is not definitely shown, and that they remained together one night after their marriage, when Fairbanks went away and was absent about a year, and upon his

return they lived together about one week; that without instituting proceedings to have her marriage to Fairbanks annulled or without procuring a divorce she, on June 13, 1866, entered into a ceremonial marriage with the soldier, and they maintained bona fide matrimonial relations up to his decease, on March 26, 1892, a period of twenty-six years, and four years after the soldier's decease she filed a bill in the supreme court of St. Lawrence County, N. Y., to have her former marriage to Fairbanks annulled, and the decree of nullity above cited was granted on April 20, 1896, which declared the marriage contract between the plaintiff, Sally A. Fairbanks, and the defendant, George Fairbanks, void from the date of the judgment, because the plaintiff had not attained the age of legal consent at the time of said marriage.

A careful construction of this decree, which became operative from the date of judgment only, would clearly appear to recognize the fact that the marriage of this claimant and Fairbanks was a valid legal marriage, in full force and effect at the date of her remarriage to the soldier in New York in 1866, and so continued until annulled on April 20, 1896, and as a natural and perfectly legal sequence her remarriage to the soldier was void and illegal in its inception, and as their relations, which were illicit in the beginning, were not changed to one matrimonial during the life of the soldier, I am constrained to hold, after a careful consideration of the language of the decree aforesaid, that claimant has no title to recognition as the legal widow of the soldier.

At common law, infants—males under 14 and females under 12 years of age—might contract a valid marriage, and might do so without the consent of their parents (*Bennett v. Smith*, 21 Barb., Ch. 439, citing numerous authorities); and these rules of the common law were held to be still (in 1856) in full force in the State of New York, with the exception that by the laws of 1841, chapter 257, the courts of that State were authorized to annul marriages when the female was, at the time of marriage, under the age of 14 (*ibid.*).

At the time, therefore, of this claimant's marriage to Fairbanks, the age of consent recognized in the State of New York in annulling marriages was, doubtless, 14 years instead of 16 years, as assumed by the chief of the law division in the above-quoted opinion, the laws of 1841 not being repealed until 1880, although superseded in 1848 by the Code of Civil Procedure, section 1743 of which, however, still provided for annulling marriages contracted while under the age of consent.

The evidence in this case fails to show with certainty the exact age of claimant at the time of her marriage to Fairbanks. It seems reasonably certain, however, that she was then over instead of under 14 years. She gives her birth as November 4, 1847, and says she was married to him in February, 1861, in her fourteenth year. Her father's sister, however, who has a record she made in 1851, showing the names and ages of his children, testifies that this record shows claimant was then, in August, 1851, 5 years of age; and claimant and said Fairbanks were married, she says, in the winter Fort Donelson was taken, she thinks, but it was at least during the war. Claimant also says it was during the war, Fairbanks being a deserter from service at the time of their marriage. Other testimony places this marriage in 1862; and the first Fort Donelson fight was in February, 1862; so that according to claim-

ant's own statement as to her birth she was 14 years of age, or in her fifteenth year, at the time of this first marriage, which was, accordingly, a valid marriage, not voidable on the ground of her being under the age of consent.

She contends, however, that the decree annulling this marriage on that ground is conclusive evidence of the invalidity of the marriage, under section 1754 of the Code of Civil Procedure of the State of New York, which provides that—

A final judgment, annulling a marriage, during the lifetime of both the parties, is conclusive evidence of the invalidity of the marriage, in every court of record or not of record, in any action or special procedure, civil or criminal. Such a judgment rendered after the death of either party to the marriage is conclusive only as against the parties to the action, and those claiming under them.

And section 1753 of said code provides that in such actions for annulling a marriage a final judgment of annulment shall not be rendered—

without proof of the facts upon which the allegation of nullity is founded; and the declaration or confession of either party is not alone sufficient as proof, but other satisfactory evidence of the facts must be produced.

Doubtless, under these provisions of the New York laws, the decree in this case would be held by the courts of that State as conclusive evidence of the invalidity of claimant's first marriage and of its invalidity for the reason therein specified, it appearing to have been rendered while both parties were living, as Fairbanks was last seen as late as 1894, two years only before, and as it appears to be incontestable on jurisdictional grounds.

But how far such decree may be binding upon the Department in this adjudication is uncertain, and whether binding at all or not is doubtful. Congress has declared that—

Marriages * * * shall be proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time of marriage or at the time when the right to pension accrued. (Act of August 7, 1882.)

It may be, therefore, that the legal effect, under the laws of New York, of the decree of annulment of claimant's marriage to Fairbanks should be held to be decisive in this case of the question of the validity of such marriage.

It is unnecessary, however, to decide this question, as, even assuming that the decree is so binding herein, the laws of New York do not make its effect such that claimant's marriage to the soldier Fuller becomes thereby valid.

The laws of New York provide that—

A marriage is void from the time its nullity is declared by a court of competent jurisdiction, if either party thereto: (1) Is under the age of legal consent. * * * (Laws of 1896, chap. 272, sec. 4);

and the decree in this case declares, accordingly, that claimant's marriage to Fairbanks is annulled from the date of the decree only.

At common law a decree of annulment of a voidable marriage operated to avoid the marriage ab initio, illegitimizing the issue and placing the parties in all respects, as to each other, as if such marriage had never been. But the court of appeals of the State of New York held in the case of *Price v. Price* (124 N. Y., 598), cited by appellant, that the common law was changed by the statute of New York as to this, and that in that State a voidable marriage is, when avoided by decree, void only from the date of the decree.

The decree in this case therefore, even if it be accepted as a valid one and as binding upon the Government, can not avail appellant, as her marriage to Fairbanks must be held to have been a subsisting one at the time of her marriage to Fuller, and the latter marriage was therefore void.

From the facts shown in evidence herein, however, it does not appear that a decree of annulment of the marriage to Fairbanks would be warranted, (1) because it appears claimant was then of full marriageable age, and (2) if it be considered she was not then of such age, it is clearly and unquestionably shown that she and he cohabited, for at least a week, under such marriage, after she had become of marriageable age, thereby confirming such marriage and debarring her, under the laws of New York, from contesting it on the ground of nonage, section 1744 of the Code of Civil Procedure providing that—

A marriage shall not be annulled * * * where it appears that the parties, for any time after they attained that age (of legal consent), freely cohabited as husband and wife.

Had the facts shown herein been presented to the court rendering the decree of annulment in this case, it is doubtful if such decree would have been rendered; or should they be now shown to that court, it is equally doubtful if the decree would be allowed to stand. Such, however, is speculation of no avail in the matter of this claim as, in every aspect of this case, it is seen the validity of claimant's marriage to Fairbanks, and the consequent invalidity of her marriage to Fuller, must be held.

It is to be deplored that the long cohabitation of claimant and Fuller as husband and wife can not be considered as legitimate and matrimonial; but, as the impediment was not removed until after his death, no other holding is possible under the law and the facts. This result is due to claimant's laches in not sooner, and during the lifetime of Fuller, procuring the annulment of her prior marriage, so that a lawful remarriage might have been contracted.

Your action was proper and is affirmed.

REMARRIAGE—DEPENDENT MOTHER—ACT OF JUNE 27, 1890.

ELIZABETH DARLING, MOTHER OF FRANKLIN RICKARD.

The remarriage of a dependent mother prior to the act of June 27, 1890, is not a bar to pension under section 4707, as amended by the first section of said act, provided the facts required by the first section of the act are duly established.—Mary Kille (7 P. D., 550).

Assistant Secretary Webster Davis to the Commissioner of Pensions, June 21, 1899.

Elizabeth Darling, mother of Franklin Rickard, late private Company H, Twentieth Ohio Infantry, by her attorney, appealed, December 28, 1898, from the Bureau action September 27, 1898, rejecting her dependent mother's claim (certificate No. 127,951), filed August 18, 1898, as under the act of June 27, 1890, on the ground of "no title, claimant having remarried after soldier's death," reference being made to Treatise of Practice, 1894, page 116, paragraph 5.

Claimant contends, in effect, that said paragraph 5 is in conflict with the provisions of section 1 of the act of June 27, 1890, and with the departmental decisions; that the fact that she remarried in 1869, is immaterial, as her said husband died prior to the passage of the act of June 27, 1890; that she is 80 years of age, poor, and dependent, within the meaning of said act, and that no one is legally bound for her support; that she was pensioned as a dependent mother under section 4707, Revised Statutes, and while her remarriage in 1869, was good ground for terminating her pension under the provisions of section 4708, Revised Statutes, it is no ground for denying her a pension under the provisions of said section 1, of the act of June 27, 1890.

The material facts in this case are as follows: Soldier enlisted October 11, 1861, and died in service March 17, 1862. Claimant was pensioned under section 4707, Revised Statutes, from the date of soldier's death, as the dependent mother of the soldier up to the date of her remarriage April 3, 1869, her former husband, the father of soldier, having died March 4, 1862. She was 80 years of age at date of filing her said application. While it is alleged in the appeal that claimant's second husband died prior to the act of June 27, 1890, the fact is not shown by the evidence on file; nor does the evidence establish her dependence or nondependence at date of filing her said application. There is simply a lack of evidence on this point, which must be supplied before the case can be allowed.

The only question presented by the appeal is, whether by her second marriage, in 1869, she has barred her right to pension under the first section of the act of June 27, 1890, which provides as follows:

That in considering the pension claims of dependent parents, the fact of the soldier's death by reason of any wound, injury, casualty, or disease which, under the

conditions and limitations of existing laws, would have entitled him to an invalid pension, and the fact that the soldier left no widow or minor children having been shown as required by law, it shall be necessary only to show by competent and sufficient evidence that such parent or parents are without other present means of support than their own manual labor or the contributions of others not legally bound for their support: *Provided*, That all pensions allowed to dependent parents under this act shall commence from date of the filing of the application hereunder and shall continue no longer than the existence of the dependence.

I am clearly of the opinion that there is no authority of law for granting a dependent parent's pension under the act of June 27, 1890, as the right to pension dependent parents is derived from the provisions of section 4707, Revised Statutes, as amended by the first section of the act of June 27, 1890. Section 4707 alone fixes the rate, and is the granting act.

Application on behalf of dependent parents should always be filed under the provisions of that section, and where the claimant relies upon present dependence, the application must be filed subsequent to June 27, 1890, as by the terms of said amendment, pension can only commence from date of filing an application subsequent to that date.

A pension application in the language of section 1 of the act of June 27, 1890, stating all the conditions named in said section would be insufficient, for in the very first line of the section we are forced to look to section 4707, Revised Statutes, to ascertain the rights of persons designated as "dependent parents," as well as to ascertain the rate of pension to which they are entitled. (Adolph Bernstein, 7 P. D., 229-231; Sarah H. Ozborn, *Ibid.*, 317; James A. Hayes, 7 P. D., 190.)

It is plain that we must look to section 4707, and also to sections 4692 and 4693, for the grant, and to section 1 of the act of June 27, 1890, for the limitation and further condition attached to the grant.

Section 1 of the act of June 27, 1890, contains no grant of pension to anyone, nor is said section in harmony with the balance of the act of June 27, 1890, except upon the single proposition of date of commencement of pension. It does, however, harmonize with the policy, theory, and provisions of section 4707, and should be read and construed in *pari materia* with the provisions of that section the same as if the two comprised but one section, bearing date June 27, 1890, when applied to dependent parents' claims filed subsequent to that date. A codifier would so arrange the section and the amendment.

In section 5600, Revised Statutes, relative to the arrangement and classification of sections, it was provided that "no inference or presumption of a legislative construction is to be drawn by reason of the title under which any particular section is placed."

As at one time framed, the first section in the Senate bill 389 was in harmony with the balance of the act of June 27, 1890, and provided for dependent parents' pension upon proof of death of the soldier, and present dependence, without proving that the soldier's death was due to the service. (See Congressional Record, No. 289, p. 5963.)

The first section as enacted was the result of conference, in which the Senate's first action was stricken out of the bill, and a bill in relation to dependent parents, which had previously passed the House, was substituted in its place. (See Congressional Record, No. 289, p. 5945.)

Said section 1 is not germane to and in no manner affects the other sections of the act. It could be eliminated without in any manner affecting the other sections of the act. So, also, the other sections could be repealed without in any manner affecting the first section; but, standing alone, or with the balance of the act, it is meaningless and of no effect; utterly incapable of enforcement; but, when united with its cognate, section 4707, it is vitalized and its meaning is clear.

A claim, therefore, on behalf of dependent parents, when filed subsequent to June 27, 1890, is filed under section 4707 as amended. Claims should be filed under the granting act, which fixes the rate, and not under supplementary amendments, which do not affect the rate. The application in this case, which purports to be filed under the act of June 27, 1890, should be treated as filed under the provisions of section 4707 as amended by the act of June 27, 1890.

Section 4708, Revised Statutes, which provides that—

The remarriage of any widow, dependent mother, or dependent sister entitled to pension, shall not bar her right to such pension to the date of her remarriage, whether an application therefor was filed before or after such marriage; but on the remarriage of any widow, dependent mother, or dependent sister having a pension such pension shall cease,"

has, in my opinion, no application to dependent mothers' claims under section 4707, as amended by the first section of the act of June 27, 1890, unless the remarriage occurs after she had been accorded a pension subsequent to June 27, 1890, as said section 1 prescribes plainly and in terms the only facts necessary to establish present dependence and entitle her to a dependent mother's pension after June 27, 1890. Under said section she must establish the fact (1) that her son died by reason of causes which would have entitled him to an invalid pension; (2) that he left no widow or minor child; (3) that she is his parent and was at the date of filing her application after June 27, 1890, and subsequent thereto, without other present means of support than her manual labor or the contributions of others not legally bound to her support.

These facts, when established, bring her clearly within the requirements of said amendment of section 4707 and entitle her to a pension.

This question appears to have been fully considered by Assistant Secretary Reynolds in the case of Mary Kille (7 P. D., 550).

In that case, as in this, the claimant had been pensioned as a dependent mother under section 4707. Her first husband having died, she remarried, whereupon her pension ceased by reason of section 4708. She filed a claim in August, 1890, claiming present dependence and

pension under the provisions of said section 1 of the act of June 27, 1890, and in that case the Assistant Secretary held as follows:

Section 1 of the act of June 27, 1890, is broad and general in its terms and is to be construed in connection with sections 4707 and 4708, Revised Statutes, in *pari materia*. While her remarriage after having obtained a dependent mother's pension would have the effect to terminate such pension in accordance with the provisions of section 4708, yet her remarriage prior to the passage of the act of June 27, 1890, is no bar to her right to pension under said act, for the reason that "her title to such pension" could not accrue under section 1 of said act prior to the date when the same became a law. When, therefore, her statutory self-dependence is shown to have existed at date of the approval of said act, and her son's death is shown to have been due to pensionable army causes, she brings her case clearly and plainly within the provisions of the later law, and her later right is in no manner affected or impaired by the provisions of section 4708 by her remarriage prior to the act of June 27, 1890. It is in the nature of an amendment to said section and broadened the provision of section 4707, which required proof of dependence upon soldier to be established at the date of the soldier's death, and substituted *present self-dependence* of the parent in the place of dependence on soldier at the date of his death, and thus created a new right to pension which did not exist prior to June 27, 1890.

So also Assistant Secretary Bussey held, in amended opinion (4 P. D., 432):

That the first section of the act of June 27, 1890, does not make remarriage a bar to pensionable dependence on part of a mother applying under its provisions.

This amended opinion was rendered August 6, 1890, for the express purpose of correcting an admitted erroneous construction of the law by the same Assistant Secretary, July 15, 1890, in which it was held that the remarriage of a dependent mother prior to the act of June 27, 1890, would bar her right to pension under said act. (See 4 P. D., p. 136.)

The amended opinion was reaffirmed by Assistant Secretary Bussey, August 18, 1892, in the case of Phebe A. Ayres, dependent mother of John E. Ayres, deceased (6 P. D., 30), wherein it was held—

that the fact of prior remarriage need not affect either the dependent mother's or the dependent father's pensionable status under the act of June 27, 1890.

It may be argued that, inasmuch as it is held that the adulterous cohabitation of a widow subsequent to the act of August 7, 1882, bars her right to pension under the act of June 27, 1890, so also it should be held that the remarriage of a dependent mother, prior to the act of June 27, 1890, should also bar her right to pension under such act.

A clear distinction is to be drawn between the case of forfeiture of pensionable status by adulterous cohabitation and the forfeiture of pensionable status of a dependent mother by remarriage after the death of the soldier and prior to her being pensioned under the provisions of said first section of the act of June 27, 1890, and for these reasons: first, as stated in the case of Matilda Ague (9 P. D., 327), in quoting from the case of Eliza Fain (7 P. D., 572):

The gravamen of the widow's offense does not lie in the fact that she was a pensioner when she committed the adulterous acts, but in the fact that her conduct was

subversive of public decency and law, and of such a character as would have caused her to forfeit all claim to support by the husband, if he were living.

Section 4708, however, is based upon an entirely different theory, viz, that upon the remarriage of a widow, mother, or sister, who were pensioners or entitled to a pension, terminated their dependency, as the law makes it obligatory upon the husband to support the wife.

Lawful marriage or remarriage is not only a legal and commendable act, but is encouraged and protected by law. Marriage is designated by Kent as "the most beneficial institution of society;" and, as stated by Bishop, "because of the high favor in which marriage is held by the law we have transmitted to us the special maxim, 'Always presume marriage.'"

Section 4707, Revised Statutes, permits the dependent mother to be pensioned, notwithstanding the fact that she has a husband. The presumption that the husband supports the wife is permitted to be rebutted in the first instance under section 4707, but section 4708 makes the presumption conclusive and nonrebuttable in case of remarriage, and unless subsequent legislation has changed this rule, the dependent mother would upon her remarriage continue to occupy a nonpensionable status.

But remarriage of a dependent mother prior to the death of her son in service, on account of whose death she claims pension, is no bar to pension under section 4707.

As was held by Assistant Secretary Bussey in the case of the mother of Abram Van Alstine (4 P. D., 349)—

Neither the fact of marriage prior to her son's death in the service, nor the existence of a husband by the first marriage at the date of soldier's death, destroys a mother's pensionable status, unless nondependence itself be thereby actually proved.

This decision was cited and approved in the case of Margaret Ridenour (5 P. D., 146).

The second reason for distinguishing the two classes of acts that terminate a pension is that, by the provisions of section 1 of the act of June 27, 1890, two facts necessary to enable a dependent mother to establish her title to pension under sections 4707 and 4708, were, in effect, eliminated, viz, first, dependence upon her son at the date of his death, and second, her remarriage subsequent to the death of her son, and prior to the time of filing her application under said section 4707, as amended by the act of June 27, 1890. Her pensionable status, determined by remarriage, is thus restored by the terms of section 1 of the act of June 27, 1890.

I am of the opinion that the remarriage of a dependent mother prior to the act of June 27, 1890, is not a bar to pension under section 4707, as amended by the first section of said act, provided the facts required by the first section of the act are duly established, and the rejection of this claim on the ground stated is accordingly reversed.

I am also of the opinion that said paragraph 5, page 116 of the *Treatise of Practice*, 1898, is in direct conflict with the law, and the

same is hereby abrogated and the following paragraph substituted in lieu thereof:

The remarriage of a mother after the death of the soldier and prior to June 27, 1890, is not a bar to pension under this act.

The case of Sarah N. Chase (7 P. D., 543), so far as it conflicts with this decision, is overruled.

RES JUDICATA—STARE DECISIS—RERATING.

CHARLES F. BORTHWICK, ALIAS FRANKLIN BROWN.

Cases long since adjudicated by previous administrations will not be disturbed for slight or trivial reasons, nor upon mere matter of opinion as to the weight of evidence, nor upon any matter involving merely an exercise of judgment or discretion, but only when glaring error, mistake, or manifest injustice is apparent from the record or the evidence.

See Birney Hoyt (1 P. D., 70); Isaac Sell (2 P. D., 172); Wallace G. Bone (2 P. D., 310); John Burnham (4 P. D., 93); Jackson Martin (7 P. D., 265); Mary E. Eastridge (8 P. D., 5); George W. Amos (ibid., 271); James M. Marshall (ibid., 395); James Duval (9 P. D., 218); William Wilson (10 P. D., —).

Assistant Secretary Webster Davis to the Commissioner of Pensions, June 21, 1899.

Charles F. Borthwick, alias Franklin Brown, late private Company I, Fifty-third Pennsylvania Infantry, appealed December 10, 1898, from the Bureau action of February 3, 1898, dropping his name from the rolls as pensioner under certificate No. 82844 on the ground of desertion from the Seventh New York Heavy Artillery, the record failing to show discharge from said service, and rejecting his rerating claim on the same ground.

Claimant contends that he was born June 8, 1848, and was under sixteen years of age at the date of his desertion from his first enlistment.

Claimant first enlisted February 5, 1864, in the Seventh New York Heavy Artillery, and deserted March 23, 1864. He next enlisted in Company I, Fifty-third Pennsylvania Infantry, and was discharged on surgeon's certificate of disability June 29, 1865.

He filed his first application for pension March 1, 1867, which was allowed by Bureau action of June 22, 1867, at \$15 per month, for gunshot wound of right arm.

He was allowed an increase to \$18 from June 4, 1872, increased to \$24 from March 3, 1883, and \$30 from August 4, 1886, which rate he was receiving at the time his name was dropped from the roll. The last Bureau action, reissuing certificate to correct his name, was had on June 10, 1893.

Claimant was specially examined August 11, 1884, when he testified fully to the facts of his first enlistment and desertion after having received a bounty of \$150. He also testified that he was thirty-seven

years of age the 8th day of June, last (1884). This would make the year of his birth 1847; yet, with these facts in its possession, the Bureau continued to recognize the action of June 22, 1867, adjudicating that he was entitled to a pension, and on October 3, 1884, increased his rate to \$24 per month. On October 23, 1886, he was conceded to be entitled to \$30 under the act of August 4, 1886. On April 8, 1897, and April 23, 1897, two supplemental reports of the War Department were filed in the case, the latter of which reported the fact of claimant's desertion from his first service; but these reports were simply cumulative evidence of the facts testified to by claimant in 1884.

The question of claimant's right to increase of pension having been several times passed upon since 1884 by previous administrations, I am of the opinion that it was error to disturb such action and drop claimant's name from the rolls, because the law, as now construed (see case of John Norton, 9 P. D., 382), would not entitle him to a pension.

The material facts in the case were the same in 1898 as in 1884.

Different views of the law as to desertion and its effect upon a soldier's pensionable status have been adopted in the past by various administrations, and, judging the future by the past, there is no assurance that the present views as announced in the John Norton decision may not be modified by some future administration.

A long line of decisions, however, are uniform and harmonious to the effect that cases long since adjudicated by previous administrations will not be disturbed for slight or trivial reasons, nor upon mere matter of opinion as to the weight of evidence, nor upon any matter involving merely an exercise of judgment or discretion, but only when glaring error, mistake, or manifest injustice is apparent from the record or the evidence.

See Birney Hoyt (1 P. D., 70); Isaac Sell (2 P. D., 172); Wallace G. Bone (2 P. D., 310); John Burnham (4 P. D., 93); Jackson Martin (7 P. D., 265); Mary E. Eastridge (8 P. D., 5); George W. Amos (*ibid.*, 271); James M. Marshall (*ibid.*, 395); James Duval (9 P. D., 218); William Wilson (10 P. D., —.)

I am therefore of the opinion that the action appealed from, dropping claimant's name from the rolls, was unauthorized in this case, and said action is accordingly reversed.

APPEALS—RERATING—ACT MARCH 6, 1896.

WESLEY DALRYMPLE (CLAIMANT).

H. D. PHILLIPS (ATTORNEY).

1. In considering claims under the act of March 6, 1896, before the commencement of pension, granted after a former claim had been rejected, may date from date of filing such first declaration, it must be shown, not only that at the date of filing such declaration he was suffering from a disability, but that such disability was of a permanent character, rendering him unable to earn a support.

2. The printed form of appeal filed by H. D. Phillips in this and numerous other cases will not hereafter be considered, unless it contains material averments in addition to the printed matter, as it does not present any issue of fact and the issue of law has been decided.

Assistant Secretary Webster Davis to the Commissioner of Pensions, June 26, 1899.

The appeal filed in this case on April 5, 1898, is one of a large number of appeals filed by H. D. Phillips, a pension attorney, of Trenton, N. J., consisting wholly or mainly of a printed argument in regard to the proper construction of that portion of the act of Congress approved March 6, 1896, relating to the commencement of pensions under the act of June 27, 1890. Some of these appeals have additional remarks written on the margin of the printed sheet; others (like the one in this case) contain nothing except the printed matter; some of them are not even signed. They have evidently been filed hurriedly and without any proper examination into the facts of the individual cases in which they have been entered. My attention was called to the fact that these "machine-made" appeals were being filed in large numbers sometime ago and the attorney was then notified that they did not comply with the rules and would not be received. Prior to that, however, a considerable number of them had been docketed and the question arises how they shall be disposed of. Some of the cases in which they have been filed have been taken up and examined and decisions rendered on the facts without regard to the form of the appeal, but I am of the opinion that in the present crowded state of the docket such action is not fair to those who have filed appeals in good faith and in conformity with the rules, and who are compelled to wait a year or more before having the same considered. Nor is such action called for by the attorney's argument, which addresses itself wholly to a general question of law and practice and not to the particular facts in each case. He is entitled to have his complaint fairly considered, but he is not entitled to have it serve as an excuse for a general overhauling of all claims in which he has filed applications under the act of March 6, 1896. If the law has been erroneously construed by the Pension Bureau that fact can be determined by one appeal as well as by a hundred. I have, therefore, elected to consider the general issue raised by the appeal in this case and the decision will serve as a basis for disposing of all appeals of the same kind now on the docket.

Briefly stated the contention of the appellant is that the proviso of the act of March 6, 1896, relating to the commencement of pensions under the act of June 27, 1890, has been misunderstood by the officials of the Pension Bureau; that to confer a right to the benefits of said act it is only incumbent upon the applicant that it be established in his case that he was suffering in a pensionable degree from a disability during the period claimed for; that the sole evidence to be considered in such a case is that of medical and lay witnesses with personal

knowledge of the facts to be established; and that, except in the case of a specific and permanent disability, the report of a medical examination by a board of surgeons is not material evidence as to the existence of a pensionable disability prior to the date of said examination. In this connection he says:

The provisions of the general law, act of June 27, 1890, and March 6, 1896, are identical in this respect; they require the pension to date from the time of filing a legal declaration, or date of soldier's discharge, and while the general law has been construed and enforced in upwards of 400,000 invalid cases, 75 per cent of which were at sometime rejected on a pension medical examination, I challenge the Department to cite a single instance where such examination barred the right of pension, when it was granted, to date from the filing of the case or the date of soldier's discharge.

The appellant overlooks two very important provisions of the act of June 27, 1890. One is that a disability, in order to be "pensionable," must be "permanent in character;" and the other is that it must exist in a certain specified degree, to wit: In such a degree as to render the claimant unable to earn a support by manual labor. In these respects the act differs from what is termed the "general law." Arrears of pension under the "general law" are granted upon satisfactory evidence that the disability incurred in the service continued after discharge, or after the filing of the application, even though in a slight degree or for a limited period. The pension may be at a merely nominal rate for a part of the time, or it may be granted to continue up to the date of a medical examination showing no disability and then to cease. This can not be done under the act of June 27, 1890.

If these distinctions be borne in mind, it becomes readily apparent why the report of a medical examination may have an effect upon a claim under one law which it does not have upon a claim under the other law. If a claimant filed his application on July 1, 1890, and was examined on July 1, 1891, and found not to be disabled in a pensionable degree, it does not prove that he had no ratable disability at the former date, but does prove (unless the surgeons erred) that such disability, if it existed, was not "of a permanent character."

The meaning and intent of the enactment of March 6, 1896, are not involved in any obscurity. The act of June 27, 1890, provided that pensions granted thereunder should commence from the date of the filing of the application in the Pension Office, after the passage of the act, "upon proof that the disability then existed." In executing the law it became necessary to determine what constituted an "application." The Department (John M. Reynolds, Assistant Secretary) held that an application which did not allege any specific disabling cause or causes was void; and that pension could in no case commence prior to the date of the filing of an application alleging the particular causes of disability upon which the grant of pension was based. (See decision in the case of Charles J. Bryant, 7 P. D., 299.)

Many claims were rejected, on the ground, not that there was not a

pensionable disability, but that there was not a pensionable disability from the causes alleged in the application. Upon the filing of a new application, alleging other causes, pension would be allowed to commence only from the date of filing the amended declaration, although there might be abundant proof that the pensionable disability existed at the time of filing the original application. It was to do away with this practice that the enactment of March 6, 1896, was passed. It provided—

That whenever a claim for pension under the act of June 27, 1890, has been or shall hereafter be rejected, suspended, or dismissed, and a new application shall have been or shall hereafter be filed, and a pension has been or shall hereafter be allowed in such claim, such pension shall date from the time of filing the first application, provided the evidence in the case shall show a pensionable disability to have existed, or to exist, at the time of filing such first application, anything in any law or ruling of the Department to the contrary notwithstanding.

The effect of this enactment was stated by the Department in a decision rendered June 17, 1896, in the case of James A. Durkee (8 P. D., 152), the gist of which was that it was immaterial when the claimant alleged the causes of his pensionable disability, provided the disability was shown to have existed at the time of filing his first application. Some technical requirements in regard to applications under the act of June 27, 1890, were still adhered to, but these were swept away by the instructions to the Commissioner of Pensions promulgated on July 28, 1897 (9 P. D., 93).

The question as to whether the pension in any given case should commence from the date of filing the first application or not, is purely a question of fact depending upon whether the evidence in the case at the time of adjudication, or that which may have been filed subsequently, shows that the applicant was, at said date, suffering from a disability of a permanent character, not the result of vicious habits, which incapacitated him for the performance of manual labor in such a degree as to render him unable to earn a support. I am not aware that any practice in conflict with this view prevails in your Bureau. For reasons already stated, the report of an examination by a board of surgeons subsequent to the filing of the application must have very great weight in determining whether a pensionable disability existed at the time of filing. The view apparently entertained by the appellant that such a report is evidence of nothing except the man's condition at the time of the examination, and that its effect may be easily nullified by filing a few perfunctory affidavits from neighbors or physicians, is erroneous.

The appellant was informed by your Bureau on March 29, 1898, that the claim of the pensioner, Wesley Dalrymple, under the act of March 6, 1896, for a reissue to change the date of commencement of his pension, was rejected on the ground that the claimant was not disabled in a degree pensionable under the act of June 27, 1890, at the time of filing any application prior to June 2, 1896, the date from which pension

was made to begin. His only answer to this is the printed statement that he has "filed evidence establishing the claimant's rights," no particular evidence being specified. This is not sufficient to raise an issue of fact requiring the consideration of the Department. After careful consideration of the legal points raised I find no sufficient reason for disturbing the action of your Bureau.

Appeals of this character, filed by Mr. Phillips in other cases, which do not contain any material averments in addition to the printed matter, will be dismissed on the ground that they do not present any issue of fact, and that the issue of law has already been decided.

MARRIAGE AND DIVORCE—SLAVES—IMPEDIMENT.

AMANDA FANE (NOW SMITH, AS WIDOW).

Claimant was pensioned as the widow of the soldier who died in the service, but her name was dropped from the rolls upon her remarriage by a ceremony with one Smith, alias Lyons. She now claims a continuance of pension on the ground that said Smith had a wife living at the time of his marriage to her. The evidence shows that Smith had a slave wife living, with whom he had not lived for some years prior to his marriage to claimant, but, having married claimant according to the forms of law, this former relation with Anna Parker had no legal effect on his marriage with claimant, and she was therefore his legal wife.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
June 29, 1899.*

The claimant in this case, Amanda Fane, now Smith, widow of Robert Fane, late private Company D, First Regiment United States Colored Volunteer Heavy Artillery, certificate No. 179232, was pensioned as the widow of said soldier from date of his death in the service, July 22, 1864, to the date of her remarriage, July 28, 1865. June 27, 1895, claimant's guardian filed an application on her behalf for restoration to the rolls, alleging that she still remained the lawful widow of the soldier; that her remarriage to James Smith, alias Lyons, was illegal and void, because said Smith at the date of said marriage had a wife living from whom he had not been divorced; that she had been deceived and defrauded out of her pension.

This claim was rejected on the ground of her remarriage July 28, 1865, as shown by the record.

An appeal was taken from said action, and by the decision of the Department October 9, 1897, said action was reversed and the case returned for special examination to determine the legality of the widow's remarriage in 1865, and whether she was entitled to restoration.

After special examination the claim for restoration was again rejected by action of the Bureau January 21, 1898, on the ground of no title, as it appears from the special examination that the remarriage of the widow to James Smith July 28, 1865, was a legal marriage.

Claimant appealed from said action February 26, 1898, contending that the evidence filed and taken on special examination shows that James Smith, alias Lyons, had a wife living from whom he had not been divorced at the date of his marriage to claimant in 1865, and that said marriage was void; that she was deceived by fraudulent representations and induced to go through the form of marriage, and assume marital relations with said Smith, not knowing that he then had a wife living, whose maiden name was Anna Parker, and that said action was error and an injustice to her.

The facts of the case as shown by record and other evidence on file and taken on special examination are as follows:

The soldier and claimant were married some years before the civil war as slaves, and lived together as husband and wife until the soldier's death.

The soldier enlisted March 11, 1864, and died in the service July 22, 1864.

Claimant was pensioned as the widow of the soldier, under claim filed after the death of her second husband, from date of his death to July 28, 1865, the date of her remarriage.

There is no doubt as to the formal marriage, in accordance with law, between claimant and Smith, alias Lyons, on July 28, 1865.

Claimant testifies under oath to this fact in her original claim for pension; it is shown by the testimony of other witnesses and by the public records.

Claimant alleges that this marriage was illegal and void because it is alleged Smith had a wife living from whom he had not been divorced when said marriage was celebrated.

And this is the only question involved in the case as brought here on appeal.

The testimony shows beyond question that Smith, alias Lyons, had a slave wife by name of Anna Parker, by whom he had several children. But it was a marriage as was common among slaves and had no legal force or effect, as the parties were not competent to make a legal contract. The testimony shows they were not married by any form or ceremony, and that they had been separated, or had not cohabited as man and wife, for several years prior to Smith's marriage to claimant.

So that whatever impediment existed in the way of a legal marriage had been removed some years prior to claimant's remarriage. No divorce was necessary; voluntary separation had the force and effect of a divorce while they were in a state of slavery.

Claimant and Smith, alias Lyons, were married July 28, 1865, as shown by the record and the testimony, and lived together until his death in 1875.

She applied for pension and was pensioned as above stated, as the widow of the soldier, from date of his death, to the date of her remarriage, July 28, 1865, and, apparently, did not discover that her remarriage was illegal and void until 1895.

The testimony and record show that the remarriage was legal, and therefore claimant has no title to restoration.

The action appealed from is therefore hereby affirmed.

RATING—ACT JUNE 27, 1890—DISABILITIES.

REUBEN F. SCOTT

It was not intended by the second section of the act of June 27, 1890, to grant pension thereunder for a degree of disability that would not materially impair a claimant's ability to earn a support by manual labor.

Assistant Secretary Webster Davis to the Commissioner of Pensions, July 7, 1899

Reuben F. Scott, late lieutenant Company A, Eleventh Kentucky Cavalry, appealed by his attorney January 18, 1898, from the Bureau action of January 4, 1898, rejecting his invalid claim (certificate No. 239002), filed June 8, 1897, under the act of June 27, 1890, on the ground of "no benefit, claimant on the rolls at a higher rate from an earlier date."

It is contended that the report of the board of surgeons shows a disability in excess of eight-eighteenths; that order 225 is at variance with the intent of Congress; that order 164 correctly interpreted the act of June 27, 1890, and should be revived; that there is nothing in said act that requires in terms that there should be a greater degree of disability than that required under the general law in order to give title.

Soldier was mustered into the service September 22, 1862, and was honorably discharged July 12, 1865. He was pensioned from date of discharge at one-fourth and one-half his rank grade, for disease of liver and resulting diarrhea, result of prison life.

He was medically examined under his said new law application at Wichita Falls, Tex., July 21, 1897, when the examining surgeon reported his pulse rate 88, respiration 24, temperature $98\frac{1}{2}$, height 6 feet $2\frac{3}{4}$ inches, weight 155 pounds, age 69.

He rated him three-eighths for chronic diarrhea. He reported almost total loss of sight of left eye, result of a pterygium, and expressed the opinion that the vision could be restored by removal of pterygium. Right eye normal, and that no other disability was found to exist.

The medical referee on July 8, 1898, reported from a medical standpoint as follows:

This claimant was rated \$6 under the act of June 27, 1890. He received \$8.50 a month under the general law. He appeals for a higher rate under the June act. He is not entitled under the June act to a rate equal to or in excess of that received under the general law.

Order No. 164 provided for the same rating under the act of June 27, 1890, as under the general law; that if a claimant was entitled to a rating of \$6 under the general law he should be pensioned at \$6 per

month under said act, and if entitled to a rating of \$12 under the general law he should be pensioned at the maximum rate under said act.

Said order 164 is as follows:

That all claimants under the act of June 27, 1890, showing a mental or physical disability or disabilities of a permanent character not the result of their own vicious habits, and which incapacitate them for the performance of manual labor, rendering them unable to earn a support in such a degree as would be rated under former laws at or above \$6 and less than \$12, shall be rated the same as like disabilities of service origin; and that all cases showing a pensionable disability which, if of service origin, would be rated at or above \$12 per month, shall be rated at \$12 per month.

That this order ignored the principle which should govern ratings under the act of June 27, 1890, was decided in the case of Charles T. Bennett (7 P. D., 1), wherein it was announced that the basis of pension under section 2 of the act of June 27, 1890, is incapacity, due to any permanent mental or physical disability, not the result of vicious habits, as rendered claimant unable to earn a support by manual labor.

Said decision having been approved by the Secretary of the Interior and the Attorney-General, order 164, issued by Green B. Raum, Commissioner of Pensions, and approved by Assistant Secretary Bussey February 15, 1890, was revoked May 27, 1893, and the Commissioner of Pensions was directed to have an examination made to determine what pensions had been allowed in disregard of the provisions of section 2 of the act of June 27, 1890.

Thereupon order No. 225 was issued by Commissioner Lochren June 9, 1895, and duly approved by the Secretary, Smith, as follows:

As to adjudication and fixing rates of pensions under the act of June 27, 1890:

(1) A claim for pension under the second section of the act of June 27, 1890, can only be allowed upon proof of mental or physical disability of a permanent character, not the result of the claimant's own vicious habits, incapacitating him from the performance of manual labor in such a degree as to render him unable to earn a support.

(2) No specific injury or disability can, as such, have a pensionable rating under that act, nor be considered otherwise than as it affects the capacity of the claimant to perform ordinary manual labor.

(3) Proof that the disability is not the result of the claimant's own vicious habits is requisite; and therefore the causes and circumstances of the origin of the disability should be shown by the evidence furnished in support of the claim for pension, so far as can be done, and by persons other than the claimant.

(4) To give the claimant a pensionable status under this act, the disability must be such as to incapacitate him from the performance of manual labor in such a degree as to render him unable to earn a support; yet the act recognizes differences in the degree—\$12 case of the greatest, and \$6 per month in case of the lowest, degree of such pensionable disability rendering the claimant unable to earn a support by manual labor. It also provides for intermediate ratings proportioned to the intermediate degrees of such pensionable disability. The proper ratings under this act will, therefore, be made in accordance with such rules for rating as the medical referee shall prescribe, subject to the approval of the Commissioner.

It appearing that certain errors had been committed in the execution of said Order No. 225, I issued the following order, February 23, 1898:

It is directed that the pending appeals from the action of reducing or terminating of pensions granted under the second section of act of June 27, 1890, in accordance

with the decision rendered May 27, 1890, in the case of Charles T. Bennett (7 P. D. , 1), shall be examined with great care.

In cases where the evidence filed, or the certificate of examination, indicates that the pension originally allowed was warranted under a just and impartial construction of the law, they should be returned to the Bureau of Pensions for a special examination, or another medical examination, or both, as may be deemed necessary.

It is held to be proper and just that such pensioners shall be granted a fair hearing, and be allowed an opportunity to show by competent proof that they were disabled in the degree, and on account of the causes alleged, at the date when the pension was reduced or terminated.

It will be understood that this action disposes of the pending appeal in such cases by reversing the action taken by the Bureau of Pensions, and remanding the case for further investigation, the reasons therefor being fully set forth.

The correctness of the principle announced in the Bennett decision, and the proper construction of section 2 of said act of June 27, 1890, was recognized by Assistant Secretary Bussey August 3, 1892, in the case of Washington Borden (6 P. D., 17), wherein he held that—

the disability thus made pensionable under the new law must be either mental or physical, of a permanent character, not the result of vicious habits, and sufficient in degree to incapacitate the claimant for the performance of manual labor and render him proportionately unable to earn a support.

I held in the case of Charles C. Wheaton (9 P. D., 156) that it was not the intention of the act of June 27, 1890, to grant pension for such degree of disability as does not materially impair the ability of the claimant to earn a support by manual labor.

In the case under consideration it appears from the face brief that his claim, under the act of June 27, 1890, was legally and medically approved for pension under said act at \$6 per month for disability resulting from disease of eyes, and as he was already in receipt of a pension under the general law of \$8.50 per month, no certificate was issued for the reason heretofore stated in the action of rejection.

I am of the opinion that, notwithstanding claimant's age and long continued disability of service origin, that he is not shown to be so disabled as to entitle him to a rate under the act of June 27, 1890, equal to that which he is now receiving under the general law.

The action appealed from is accordingly affirmed.

MARRIAGE AND DIVORCE—FRAUD.

ELIZABETH ACTON, ALLEGED WIDOW OF JOHN QUINN.

Claimant alleges that she was married to the soldier, John Quinn, at Vincennes, Ind., November 20, 1867, under her maiden name of Elizabeth Ryan, and relies entirely for proof of that fact on a certified transcript of the marriage records of the county in which Vincennes is situated, showing the marriage of one John Quinn to "Eliza Frederick" on the date alleged. It is conclusively proved that said marriage record referred to entirely different persons than alleged by claimant, and that the minors of John Quinn, of Company F, Twenty-fourth Indiana Volunteers, the person to whom said record refers, have filed a copy of the same record to prove the marriage of their deceased father to their mother, Eliza Frederick; therefore, claimant having failed to prove her marriage to soldier, can not be regarded as his lawful widow.

Assistant Secretary Webster Davis to the Commissioner of Pensions, July 7, 1899.

Elizabeth Acton, formerly Quinn, filed in your Bureau on April 7, 1893, an application for pension under the provisions of Section 4702, Revised Statutes, as widow of John Quinn, late private, Company B, Tenth Illinois Volunteer Cavalry, alleging the death of said soldier on December 10, 1877, from disease contracted in line of duty during his military service.

Said claim was rejected on January 19, 1898, upon the ground that a lawful marriage between the said Elizabeth and the deceased soldier was not established, and the evidence failed to show that she was his widow.

From said action appeal was taken on February 28, 1898.

The evidence shows that the deceased soldier died in Burlington, Iowa, upon the date alleged.

The appellant alleged and testified that she was married to the deceased soldier at Vincennes, Knox County, Ind., on November 20, 1867, by a justice of the peace, under her maiden name of Elizabeth Ryan, and that she had never been previously married. A ceremonial marriage between these parties is alleged and relied upon to establish the pensionable status of this appellant as the widow of the deceased soldier, no common law marriage being alleged, and no facts shown, or proof offered from which such a relation could be presumed.

As evidence of her said alleged marriage to the deceased soldier, the appellant produced and filed a duly certified transcript from the marriage records of Knox County, Ind., which shows that on November 19, 1867, a license to marry was issued to Mr. John Quinn and Miss Eliza Frederick, and that on the following day John Quinn and Ellen Frederick were duly married by one John Barkman, a justice of the peace. She swears that this record relates to her marriage to the soldier, and it is the only direct proof of said marriage that she has been able to produce.

With regard to the variance between said record and her own sworn statements as to her maiden name she has made several inconsistent and varying statements. At first she swore that she was living, at the time of said marriage, as a servant in Vincennes, Ind., with a family named Frederick, and that she was called Eliza, or Lizzie, and Mr. Frederick went with John Quinn, the soldier, to the clerk's office to procure the license, and she supposed her name was given to the officer issuing the license as Eliza Frederick, instead of her true name, Elizabeth Ryan, by mistake. Again, she testified, that she had given birth to an illegitimate child prior to her marriage to the soldier, and in order to conceal that fact from him she represented herself as a widow, Mrs. Frederick, and was married under that name. She has also stated under oath that she had no knowledge as to how the discrepancy in said record occurred, and had no explanation to offer relative thereto.

She still maintained, nevertheless, that said record was the record of her marriage to the deceased soldier, and that she was married to him by the magistrate, and on the date therein mentioned.

A careful investigation of this case developed the fact, however, that there were two John Quinns, the deceased soldier and a John Quinn, who served as a private in Company F, Twenty-fourth Indiana Volunteer Infantry, both of whom appear to have lived in the neighborhood of Vincennes, Ind., about the time this appellant claims to have married the deceased soldier in that town. It was furthermore discovered that the minor children of this latter John Quinn had filed in your Bureau on June 7, 1890, an application for pension under the provisions of section 4702, Revised Statutes, in which they had filed as proof of the marriage of their parents the identical record filed by and relied upon by this appellant to prove her marriage to the deceased soldier. Not only was it conclusively shown by the testimony taken on said special examination that the John Quinn who served in Company F, Twenty-fourth Indiana Volunteer Infantry, and the deceased soldier were not identical, but it was absolutely established that this appellant was an entirely different person from the Eliza or Ellen Frederick named in said record, and that said record had no relation or reference to her marriage to the deceased soldier whatever, but was the true record of the marriage between John Quinn of Company F, Twenty-fourth Indiana Volunteer Infantry, who is shown to have lived from and after the time of his discharge near Vincennes, in Knox County, Ind., and to have died and been buried there in March, 1877, and Eliza Frederick, his wife, whose identity is fully established, and who was born and raised and lived all her life in the same county, and who died and was buried there in 1883. The mother, sisters, brothers, and neighbors of the real Eliza Frederick, who are now living, and are reputable and credible witnesses, all testify to her identity, and that they knew her all her life, from the time of her birth to her death in 1883. They state that she was married to John Quinn, who served in Company F, Twenty-fourth Indiana Volunteer Infantry, in Knox County, Ind., on November 20, 1867, by John Barkman, a justice of the peace, and lived with him as his wife until his death in said county in March, 1877, and that she continued to live in the same county, township, and neighborhood as his widow until her own death in 1883. The death of the true Eliza Frederick is fully established by witnesses who were present when she died, saw her after death, and were present at her funeral and saw her buried. Not one of these witnesses ever saw or heard of the deceased soldier or this appellant, or ever knew of their existence.

It is manifest, therefore, that this appellant has attempted to establish the validity of her alleged marriage to the deceased soldier by a record which had no reference to her at all, but was the record of a marriage between entirely different parties, and to bolster up and strengthen said record by false and fraudulent statements under oath.

The evidence shows that she had given birth to at least two illegitimate children prior to the time she pretends to have first met and married the deceased soldier, and that she never lived with a family named Frederick in Vincennes, Ind., or any other place, and was never known or called by the name of Frederick, but was always known prior to her association with the deceased soldier as Lizzie Ryan. It also tends strongly to show that she was never at any time married to the deceased soldier, but simply "took up" with him and lived with him for some years as his wife and had several children by him, but that at no time were their relations such as would constitute lawful matrimony.

However this may be, the exposure of the fraudulent conduct of claimant in filing said marriage record leaves this case without any direct or positive proof whatever of the alleged marriage between herself and the deceased soldier other than her own statements, which have been shown to be utterly untrustworthy and unworthy of belief.

It is therefore very evident that the rejection of this claim upon the ground stated was not error, and said action is affirmed accordingly.

RATING—ACT JUNE 27, 1890—DISABILITY.

CHARLES NOEBURY ALIAS WILLIAM WALKER.

1. Pensions under section 2 of the act of June 27, 1890, can not be rated as under sections 4692 and 4693 R. S., or the act of August 27, 1888.
2. To be ratable under the second section of the act of June 27, 1890, a disability must not only be of a permanent character, not the result of claimant's vicious habits, but must incapacitate him for the performance of manual labor, and that in a degree rendering him unable to earn a support.
3. Total deafness of one ear only is not a pensionable condition under said act.

Assistant Secretary Webster Davis to the Commissioner of Pensions, July 12, 1899.

I have considered the appeal of Charles Norbury alias William Walker (No. 5642), late ordinary seaman on U. S. steamers *Carondolet*, *Princeton*, and *Wise*, United States Navy.

Claimant first filed a claim under the second section of the act of June 27, 1890, June 11, 1895, alleging permanent disability from disease of lungs, liver, and kidneys, deafness of right ear, catarrh, and rheumatism, which claim was rejected December 7, 1895, on the ground that he was not disabled in a degree ratable under said act.

January 21, 1896, and June 6, 1896, he filed other claims under said act of 1890, which were rejected, respectively, on April 10, 1896, and November 9, 1896, on the same ground as was the first claim.

March 27, 1897, he filed another claim alleging as disabling causes deafness of right ear, kidney complaint, rheumatism in left knee, catarrh, and lung disease. This claim was rejected January 3, 1898, on the ground that no ratable disability was shown.

From this action an appeal was filed January 18, 1898, assigning as error the holding that the report of the board of surgeons by which claimant was last examined does not show a ratable degree of disability under the law of 1890. The attorney contends as follows:

Our understanding is that the report of said board shows a disability in excess of six-eightieths, but that under Order 225 this is not regarded as enough to confer title; we respectfully suggest that there is nothing in the act of June 27, 1890, that requires, in terms, that to devolve title under it there should be found a degree of disability greater than were the claim filed under the general law, and believing that said Order 225 is at variance with the intent of Congress and that Order 164 (repealed by Order 225) correctly interpreted the law under which this claim is filed, we have the honor to request that said Order 164 be revived and that this claim be considered under it.

Claimant was examined under said claims by boards of examining surgeons November 6, 1895, February 6, 1896, July 29, 1896, and April 14, 1897, who reported his condition normal in every respect except partial deafness in right ear.

The certificate of the first examination stated that he hears loud voices at 2 inches with right ear; left ear was normal. The certificate of the next examination stated that he could hear ordinary conversation with either ear at 6 feet. The next certificate states that he can not hear loud conversation at 1 foot with right ear, but hears ordinary conversation at 20 feet with left ear. The next and last certificate of the examination under the pending claim states that he can not hear loud voice at 1 inch with right ear, and that left ear was normal. All other organs were reported to be normal.

Attorneys for appellant contend that Order 164 correctly interpreted the act of June 27, 1890, and that a disability which would be pensionable under the general law is pensionable under the said act of 1890.

Order 164, to which the attorneys refer is as follows:

That all claimants under the act of June 27, 1890, showing a mental or physical disability or disabilities of a permanent character, not the result of their own vicious habits, and which incapacitate them for the performance of manual labor, rendering them unable to earn a support in such a degree as would be rated under former laws at or above \$6 and less than \$12, shall be rated the same as like disabilities of service origin; and that all cases showing a pensionable disability which, if of service origin, would be rated at or above \$12 per month, shall be rated at \$12 per month.

Order 225, which abrogated Order 164, is as follows:

ORDER NO. 228.]

BUREAU OF PENSIONS,
Washington, D. C., June 9, 1893.

As to adjudicating and fixing rates of pensions under the act of June 27, 1890.

(1) A claim for pension under the second section of the act of June 27, 1890, can only be allowed upon proof of mental or physical disability of a permanent character, not the result of the claimant's own vicious habits, incapacitating him from the performance of manual labor in such a degree as to render him unable to earn a support.

(2) No specific injury or disability can, as such, have a pensionable rating under that act, nor be considered otherwise than as it affects the capacity of the claimant to perform ordinary manual labor.

(3) Proof that the disability is not the result of the claimant's own vicious habits

is requisite; and therefore the causes and circumstances of the origin of the disability be shown by the evidence furnished in support of the claim for pension, so far as can be done; and by persons other than the claimant.

(4) To give the claimant a pensionable *status* under this act, the disability must be such as to incapacitate him from the performance of manual labor in such a degree as to render him unable to earn a support; yet the act recognizes differences in the degree in case of the greatest, and \$6 per month in case of the lowest degree of such pensionable disability rendering the claimant unable to earn a support by manual labor. It also provides for intermediate ratings proportioned to the intermediate degrees of such pensionable disability. The proper ratings under this act will, therefore, be made in accordance with such rules for rating as the medical referee shall prescribe, subject to the approval of the Commissioner.

WM. LOCHREN, *Commissioner*.

Approved:

HOKK SMITH, *Secretary*.

The law applicable to pensions under the general law for disability of service origin is as follows:

Any officer of the Army, including regulars, volunteers, and militia, or any officer in the Navy or Marine Corps, whether regularly mustered or not, disabled by reason of any wound or injury received, or disease contracted while in the service of the United States and in line of duty, etc.

The second section of the act of June 27, 1890, provides as follows:

SEC. 2. That all persons who served ninety days or more in the military or naval service of the United States during the late war of the rebellion and who have been honorably discharged therefrom, and who are now or who may hereafter be suffering from a mental or physical disability of a permanent character, not the result of their own vicious habits, which incapacitates them for the performance of manual labor in such a degree as to render them unable to earn a support, shall, upon making due proof of the fact according to such rules and regulations as the Secretary of the Interior may provide, be placed upon the list of invalid pensioners of the United States, and be entitled to receive a pension not exceeding twelve dollars per month and not less than six dollars per month, proportioned to the degree of inability to earn a support; and such pension shall commence from the date of the filing of the application in the Pension Office after the passage of this act, upon proof that the disability then existed, and shall continue during the existence of the same.

It will be seen that the general law pensions for a disability the result of claimant's service in line of duty, and, rated at from \$6 per month to \$30 per month, the latter rate being allowed for a disability which incapacitates claimant for the performance of any manual labor, while the act of June 27, 1890, provides a pension for a condition not due to the service. That is, a mental or physical disability of a permanent character, not the result of vicious habits, which incapacitates for the performance of manual labor in such a degree as to render the applicant unable to earn a support, fixing the highest rate of pension thereunder at \$12 per month and the lowest \$6. Under said act pension is provided for only in cases where incapacity to labor joins with incapacity to earn a support, and the grades of rating are dependent on these two conditions.

Order 164 was in force from the date of its promulgation, October 15, 1890, to May 27, 1893, when it was revoked in an order following the

decision in the case of Charles T. Bennett (7 P. D., 1), which directed that—

an examination be made to determine what pensions have heretofore been allowed under section 2 of the act approved June 27, 1890, in disregard of the terms of said act, and in conflict with the ruling of this Department in the case of Charles T. Bennett this day transmitted to you.

This action gave rise to Order No. 225.

In compliance with instructions contained in the order of the Secretary referred to, a board of revision was organized in the Bureau of Pensions June 9, 1893, whose duties were—

to draw from the admitted files, as rapidly as may be practicable, all cases allowed under section 2 of the act of June 27, 1890, and to determine whether the allowances are in accordance with law.

This action resulted in dropping a large number from the rolls and reducing the pensions of many others.

Order 225 has never been revoked, although a much more liberal construction of the law, as well as of the order itself, has long since been put in force.

A large number of appeals have been filed within the past two years from what was deemed an arbitrary and unwarranted construction of the law resulting in the reduction or termination of pensions, and the matter having been brought to the attention of the Assistant Secretary, on February 23, 1898, the following order was issued for the guidance of the Board of Pension Appeals:

Order.]

DEPARTMENT OF THE INTERIOR,

Washington, February 23, 1898.

It is directed that the pending appeals from the action of reducing or terminating pensions granted under the second section of the act of June 27, 1890, in accordance with the decision rendered May 27, 1893, in the case of Charles T. Bennett (7 P. D., 1), shall be examined with great care.

In cases where the evidence filed or the certificate of examination indicates that the pension originally allowed was warranted under a just and impartial construction of the law, they should be returned to the Bureau of Pensions for a special examination, or another medical examination, or both, as may be deemed necessary.

It is held to be proper and just that such pensioners shall be granted a fair hearing and be allowed an opportunity to show by competent proof that they were disabled in the degree, and on account of the causes alleged, at the date when the pension was reduced or terminated.

It will be understood that this action disposes of the pending appeal in such cases by reversing the action taken by the Bureau of Pensions, and remanding the case for further investigation, the reasons therefor being duly set forth.

WEBSTER DAVIS,

Assistant Secretary.

In carrying out the instructions it was found that the action of dropping or reducing pensions in many cases was grossly unjust and in others fully warranted.

Order 164 was an extremely liberal construction of the law as to rating under the act of June 27, 1890; indeed it could not be consistently maintained when the terms of the act were compared with former

laws. On the other hand, Order 225, as put into effect and as formerly construed, went to the other extreme, and in many cases resulted in great injustice to claimants. This was remedied in a large measure by a more liberal construction of said order, which, on its face, is not regarded objectionable, properly construed, but much depends upon how it is construed.

When a claimant is disabled in a degree materially affecting his capacity to earn a support, the minimum rate should be given, and where a claimant is wholly unable to earn a support, or nearly so, by reason of a disability of the character named in the law, the maximum rate should be allowed, and for intermediate degrees of disability and capacity to earn a support a proportionate rate.

But it is not believed that deafness of one ear is a disability materially affecting a person's ability to perform manual labor or his capacity for earning a support, especially, as in this case, where claimant is shown to be a robust and able-bodied man.

While under the approved schedule of rates of pension under the act of August 27, 1888, which provided the rate for total deafness of both ears should thereafter be \$30, this appellant would be entitled to a rate of \$10, provided such deafness was due to his military service and in line of duty, he can not be accorded a rate under the second section of the act of June 27, 1890, because "incapacity to perform manual labor, to a degree which produces inability to earn a support" (which is the basis of pension under this section), has not been shown.

As before stated, disability from causes other than of service origin is pensionable when incapacity to labor joins with incapacity to earn a support, and the grades of rating are dependent upon these conditions. Appellant would be pensionable if his deafness was shown to have been incurred in the service and line of duty, because a statute (act of August 27, 1888) expressly provides for the same, but under the act of June 27, 1890, providing for pensions for other causes than disability incurred in the service and line of duty, he is not entitled to a rating, because he is not suffering from a disability "which incapacitates" him "for the performance of manual labor in such a degree as to render" him "unable to earn a support," as required by the act.

The same is true as to many other causes of disability enumerated in the schedule of rates under the general law.

It will be observed that in the last clause of Order 225 the question of rating is left largely at the discretion of the medical referee, subject to the approval of the Commissioner of Pensions.

As already indicated, much depends upon the construction given to the law and the order (225) now in force. It should be borne in mind that the average age of the surviving soldiers who were in the war of the rebellion is 60 years or upward. It is not an unreasonable presumption that nearly all are in some degree mentally or physically disabled. The spirit of the law and the circumstances attending its enactment certainly warrant the conclusion that a liberal interpretation should be

given and relief granted, at least at the minimum rate, if an appreciable disability which impairs ability for self-support by manual labor is shown to exist.

The adverse action taken in this case is affirmed for reasons stated.

MARRIAGE AND DIVORCE—MINORS' PENSION ACT JUNE 27, 1890.

MARY E. RESSER (WIDOW).

MINORS OF CHARLES W. RESSER.

1. It appearing that the last marriage of this appellant, Mary E. Resser, to the deceased soldier was subsequent to the passage of the act of June 27, 1890, she has no title whatever to pension as his widow, under the express provisions of the third section of said act.
2. It also appearing that the widow of said deceased soldier is still living and unmarried, his minor children have no title to pension under the provisions of said section. (Minor child of Lafayette Howard, 8 P. D., 230; Minors of John Davis, 9 P. D., 151.)

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
July 14, 1899.*

Mary E. Resser filed in your Bureau on June 28, 1897, an application for pension under the provisions of section 3, act of June 27, 1890, as widow of Charles W. Resser (deceased), late sergeant, Company H, Thirty-seventh Illinois Volunteer Infantry, alleging the death of said soldier on June 18, 1897, leaving her without other means of support than her daily labor.

On the same date she also filed an application for pension under said section as guardian for and in behalf of Albert F. and Bennie Resser, minor children of said deceased soldier, alleging that said minors were under the age of 16 years at the date of the soldier's death.

Both of said claims were rejected on January 6, 1898.

The widow's claim, upon the ground that her last marriage to the soldier was subsequent to the passage of said act, and she was expressly excluded from its benefits by the terms and provisions of said section.

The minor's claim, upon the ground that the soldier left a widow surviving, who was still living and unmarried, and said minors had no title to pension under the provisions of said section.

From the rejection of both claims, as aforesaid, this appeal was taken on May 2, 1899.

There is no dispute about the material facts in this case, which are shown to be as follows:

This appellant and the deceased soldier were first married in August, 1871, and lived as husband and wife until January 7, 1895, upon which date the appellant was granted an absolute divorce from the soldier by the district court of Polk County, Iowa. It is shown by a duly

certified and authenticated transcript from the records of said court that said divorce proceedings were instituted by the appellant; that both parties appeared in person and by attorney at the trial and hearing of said cause; that a divorce was prayed on the ground of "inhuman treatment," and that, in the language of the decree rendered, it was—

ordered, adjudged, and decreed by the court that the bonds of matrimony heretofore existing by and between the said plaintiff, Mary Resser, and the said defendant, Charles Resser, be, and the same are, hereby and forever dissolved, and said Mary Resser is entitled to all the rights and privileges of a single woman.

Subsequently it appears, on July 15, 1896, the appellant and the deceased soldier were again married by a justice of the peace in Polk County, Iowa, and lived together as husband and wife until the soldier's death, which is shown to have occurred on the date alleged. It is also shown that said Albert F. and Bennie Resser were children of the soldier and appellant, born to them during their first marriage and prior to said divorce, and that they were under the age of 16 years at the date of the soldier's death.

The language of the second proviso to the third section of the act of June 27, 1890, expressly and in terms excludes from participation in its benefits such widows as have married the soldier, on account of whose death the claim for pension is made, subsequent to the date of the passage of said act.

The contention of the attorney of appellant in this appeal, that the remarriage of the appellant and the deceased soldier subsequent to their divorce was "in the nature of a continuation of the first marriage relation, since she had not remarried in the interim," is without any foundation whatever in the facts of the case, and as a legal proposition is absurd.

The decree of divorce by a court of competent jurisdiction absolutely and completely abrogated, annulled, wiped out, and destroyed the previous matrimonial relation existing between the appellant and the soldier, and relegated each of them to the legal status of single, unmarried persons from and after the date of its rendition. This appellant was then free to marry again whomsoever she pleased, and was, in the eye of the law, as much a single, unmarried woman as if she never had been married, and if the soldier had died prior to her second marriage to him she could have set up no valid claim whatever to be considered his widow. The second marriage of the appellant and the soldier on July 15, 1896, was a separate, distinct, and independent contract and bore no relation to and was in no possible manner or way connected with their former matrimonial union, and the present status of this appellant as the widow of the soldier, and all her rights as such, both legal and pensionable, rest solely and alone upon said second marriage and are derived therefrom. Since said second marriage was consummated long after the passage of the act of June 27, 1890, it is too

manifest for argument that she has, by the express terms of the third section of said act, no title whatever to pension thereunder as the soldier's widow.

So far as the claim on behalf of the minors is concerned, it is the well-settled ruling of this Department that they can have no title to pension in their own right, under the provisions of said section, so long as their mother, this appellant, is living and remains unmarried, notwithstanding the fact that her last marriage to the soldier was subsequent to the passage of the act of June 27, 1890.

See decisions in the cases of the minor child of Lafayette Howard (8 P. D., 230), and minors of John Davis (9 P. D., 151).

It is very evident, therefore, that the rejection of both of said claims upon the grounds stated was without error and said action is affirmed accordingly.

DECLARATIONS—EXECUTION.

GEORGE M. HOFMANN.

An application for pension executed on the day of the applicant's discharge from the service is null and void.

Assistant Secretary Webster Davis to the Commissioner of Pensions, July 14, 1899.

I have considered the appeal filed June 1, 1899, from the action of your Bureau in refusing to recognize the application for pension filed December 8, 1898, by George M. Hofmann, formerly a soldier in Company C, Twenty-first United States Infantry. It appears that the soldier was discharged from the service on December 6, 1898, and on the same day executed his application for pension, which was filed in your Bureau two days later. You held that said application was invalid, for the reason that it was executed before the applicant had acquired a pensionable status. It is contended in the appeal that such holding was error for the following reasons:

First. The claimant was discharged on the forenoon of December 6, 1898, at Plattsburg Barracks. Immediately after his discharge the muster-out officer delivered to him his discharge certificate. He was then absolutely free from any Government control and free to act and do as he pleased without hindrance on the part of any military officer. The execution of the declaration after he received his muster-out papers was, in my judgment, proper and under the circumstances the claim he filed is legal and should be accepted as such.

Second. After the muster out of the claimant had taken place, supposing he had been injured or killed, would the Government be holding to the widow or heirs? I think not, and I believe that you would so hold that the Government was not responsible from a pensionable point of view.

In the case of William H. Walcott, Company D, Fourth Ohio Infantry (claim No. 1,217,415, war with Spain), the Department ruled, on March 22, 1899, that—

a declaration for pension executed prior to the date when the right to pension accrued is null and void.

In that case the claimant executed his declaration on January 9, 1899, and was not mustered out of service until January 20, 1899. The gist of the ruling, however, was not that a soldier can not make a valid application for pension prior to his discharge, but that no person, whether soldier, widow, minor child, or dependent relative, can execute a valid application prior to the date at which his or her right to pension accrues. In other words, it was held that a paper purporting to be a claim for pension, executed by a person who had, at the time, no right to pension, but who merely expected to have such a right at some future time, was a nullity; and that a valid declaration for pension can be made only by one who has a pensionable status.

If this view is correct (of which I think there can be no doubt) then the declaration executed by Hofmann on December 6, 1898, was invalid for the reason that he did not acquire a pensionable status until December 7, 1898. It may be true, as alleged (although there is no proof of the fact), that he had received his certificate of discharge; nevertheless, he was constructively in the service during the whole of that day, and received pay for the same. As he could not receive pay as a soldier and pension at the same time, it follows that the right to pension did not accrue until the right to pay ceased, which was at the expiration of December 6, or the beginning of December 7. In the matter of soldiers' pay and pensions, the Government takes no note of fractions of a day.

All that is said in the appeal about his being "free to act as he pleased, without hindrance on the part of any military officer," etc., is entirely irrelevant to the issue. So far as the execution of a declaration for pension is concerned, he was as free from hindrance on the part of the military authorities before he received his discharge as he was afterwards. It was a matter with which the military authorities had nothing to do. The question is not whether he was at liberty to execute such a paper if he desired, but whether the paper was of any legal effect.

Irrelevant, also, is the argument that if he had been killed or injured immediately after muster out his widow or heirs would have had no claim upon the Government. In such a case the question of "line of duty" would enter.

After careful consideration, I am of the opinion that the action of your Bureau, from which the appeal is taken, was correct, and the same is, therefore, affirmed.

SERVICE—MISSOURI MILITIA—HAWKINS TAYLOR COMMISSION.

FRANCIS M. DAVIS.

The report of the Hawkins Taylor commission shows an actual military service rendered to the United States by the claimant of only forty-five days.

The report from the adjutant-general of Missouri showing an interval of one hundred and two days between date of enrollment and date of disbandment of company is not competent evidence as to the "actual military service rendered the United States," and no other service can be taken into account in considering claims to pension under the act of June 27, 1890.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
July 29, 1899.*

The claim of Francis M. Davis, formerly a soldier in Captain Drumright's company (D), Greene County Regiment, Missouri Home Guards (the same being a claim for pension under the act of June 27, 1890), was rejected by your Bureau in January, 1893, on the ground that the claimant was not in the service of the United States for ninety days. From that action an appeal was taken on June 7, 1898, the contention of which is that at the time of the investigation made by the Hawkins Taylor commission to determine the period of service of persons claiming compensation on account of service rendered in the Missouri Home Guards organizations an error was made whereby the records of only a part of the service of Captain Drumright's company were furnished to the commission, so that the men received pay for only forty-five days, whereas the complete records, which were furnished to the adjutant-general of Missouri, show a service of from one hundred and one to one hundred and three days; and that this error ought not to debar them from the benefits of the act of June 27, 1890, to which they are justly entitled.

A report from the adjutant-general of the State of Missouri dated June 6, 1892, states that it appears from the records of his office that F. M. Davis enlisted on the 7th of May, 1861, as a private in Company D, Greene and Christian Counties Regiment of Missouri Home Guards, and was disbanded with the company on August 16, 1861. This is not conclusive, however, as to the length of time the company was "in the service of the United States." Much of the service rendered by the home guard organizations was for purposes of local defense merely, and not for the national defense or in obedience to any Federal authority. Such service has never been recognized as entitling those who performed it to either pay or pension from the General Government.

The report of the Hawkins Taylor commission states:

Previous to the outbreak, at the suggestion of General Lyon and for their own protection, many of these companies organized and armed themselves, and patrolled through their respective neighborhoods, watching the movements of the disaffected. After hostilities other companies organized, drilled, and protected their own and neighbors' property and the peace of the country.

The Hawkins Taylor commission was appointed for the purpose of determining for what length of time applicants for pay, bounty, or pension under the provisions of the act of March 25, 1862, were "actually employed in the military service of the United States," and in the performance of that duty it properly excluded such irregular and purely local service as that described above, and included only actual military service in the field rendered in obedience to proper authority. Its findings have been uniformly accepted in adjudicating claims for pension under the acts of July 14, 1862, and June 27, 1890.

Even if a probable error were shown in the report of the commission it does not lie within the province of this Department to correct it. The determination of all questions relating to the enlistment and discharge of soldiers pertains exclusively to the business of the War Department. (8 P. D., o. s., 452.) The report of the Hawkins Taylor commission is part of the records of the War Department; consequently, if any error in the same exists it should be corrected by that Department.

The report shows (according to a statement furnished by the War Department on February 26, 1892), that on the claim of F. M. Davis, of Captain Drumright's company (D), Greene County Regiment, Missouri Home Guards, for services between June 23, 1861, date of organization, and August 16, 1861, date of discharge, the period of one month and fifteen days was allowed as actual military service rendered the United States.

It would seem from this that the appellant only claimed compensation for services between June 23, 1861, and August 16, 1861, a period of fifty-five days. The commission found that his "actual military service rendered the United States" (which is the only service that can be taken into account in considering his claim for pension under the act of June 27, 1890) comprised only forty-five days. The report of the adjutant-general of Missouri as to the date of his enrollment does not touch the question at issue. The action of your Bureau was in accordance with the law and the evidence, and is accordingly affirmed.

PRACTICE—REOPENING—MEDICAL EXAMINATIONS.

ANDREW G. CLARK.

Where, under the general law, claim for pension is made on account of general debility, a medical examination is held which discloses no cause of disability, and thereupon the claim is rejected, the fact that a condition of general debility is shown to exist subsequently does not warrant action reopening the claim.

Assistant Secretary Webster Davis to the Commissioner of Pensions, July 31, 1899.

On February 11, 1898, an appeal was entered from the action of the Bureau in the claim for pension, under the general law, of Andrew G.

Clark, first lieutenant, Second Battery, Kansas Volunteer Light Artillery. The appellant served in said organization from February 11, 1862, to August 11, 1865.

In his original declaration under the general law, filed June 11, 1889, he alleged disease of eyes and general debility as of service origin. Pension was allowed on account of disease of eyes. The claim as to general debility was rejected April 26, 1895, upon the ground of no ratable disability since date of filing.

Certificate issued October 1, 1896, to allow the claimant pension under the act of June 27, 1890, at \$12 per month, general debility being approved as the disabling cause.

In decision dated January 22, 1898, in claim for straight increase under the general law, attention was invited to—

* * * an apparent inconsistency in the action of the Bureau with reference to general debility, it having refused to recognize a disability from that cause under the general law, whereas under the act of June 27, 1890, general debility is recognized as the only disabling cause and as entitling the pensioner to \$12 per month.

February 10, 1898, appeal was entered from the action of the Bureau in rejecting claim on account of general debility under the general law, upon the ground assigned.

In a slip dated February 5, 1898, the Medical Referee stated:

Relative to the action taken by this division (medical) April 29, 1895, in denying a rate for general debility under the general law "because of no disability since filing," the same was correct and in accord with ruling 189 of this Bureau.

Whilst there may be an apparent inconsistency in the action of granting a rate of \$12 under the act of June 27, 1890, for the same disability, it is believed to be in conformity with the rules of the Bureau.

Ruling 189 is as follows:

RULING No. 189.]

DEPARTMENT OF THE INTERIOR,
PENSION OFFICE,
Washington, D. C., May 11, 1886.

In the claim of John L. Carberry, on the 24th day of July, 1885, claimant filed an original declaration for invalid pension, alleging as pensionable cause "*general debility*." He being called upon to allege more specifically the disabilities by reason of which he claimed pension, on October 17, 1885, declared for sciatica and rheumatism.

In the claim of John R. Messmore, under date of February 12, 1884, claimant filed a declaration alleging as pensionable cause "*debility*" contracted in the service. He being called upon to specify more distinctly the specific disability by reason of which he claimed pension, on the 10th day of February, 1885, filed an affidavit in the nature of a supplemental or explanatory declaration, setting up as specific disability chronic diarrhea.

The question presented for decision is as to the date of the commencement of pension in each claim; whether pension shall be allowed to commence from the date of the filing of the original declaration in each claim, or from the date of the filing of the supplemental or explanatory declaration or affidavit.

Held—

That pension can not issue at a date antecedent to the filing of a declaration containing such allegations as may be lawfully construed to be a foundation for the adjudication of pension. Any amendment offered, to be effective as against the

limitation, must be by particularizing some disability already declared for, or within the usual, natural, and ordinary scope of such prior declaration. Therefore, if the claims are otherwise established, pension in the case of Carberry will commence October 17, 1885; and in the claim of Messmore the pension will commence the 10th day of February, 1885.

JOHN C. BLACK, *Commissioner*.

Appellant filed no evidence showing treatment while in the service, upon discharge or prior to filing claim, for any cause or disability except disease of eyes. He filed the affidavits of comrades who knew him in the service and of others who saw him at intervals during a period of twenty years subsequent to discharge and of still others who were acquainted with him in recent years. These witnesses state that claimant was suffering with disease of eyes and "general debility." One witness testified that claimant was emaciated, "was unable to get any flesh on his bones." Beyond this nothing further relative to his condition was disclosed except as shown by certificates of medical examination.

The board of surgeons who medically examined claimant January 8, 1890, stated his age to be 49 years, height 5 feet 7 inches, weight 123 pounds.

Tongue slightly furred. Skin is in good color and condition. Heart, lungs, liver, spleen, kidneys—all abdominal viscera are normal. Conjunctivæ of both eyes in slight degree of chronic inflammation, with very slight granular condition; internal structure of eye normal. * * *

Medical examination held September 9, 1891, disclosed objective conditions as follows: Age, 50 years; weight, 118 pounds; height, 5 feet 6½ inches; tongue and skin clear, figure erect, thin, slight degree of emaciation; digestion and general nutrition only fairly well performed; muscles slender and soft; almost no adipose tissue about body; proportionate debility old age for his years. * * * Rated six-eighteenths for disease of eyes, four-eighteenths for general debility, and four-eighteenths for old age.

January 3, 1894, claimant was medically examined in claim for pension under the act of June 27, 1890. The board of surgeons certified to finding objective conditions as follows:

Age, 52 years; weight, 114 pounds; height, 5 feet 5½ inches. Upon examination we find a chronic conjunctivitis and, with exception of presbyopia, his vision is normal. There is no stiffness of any joint and no limitation of motion. No contraction of any muscle or tendons. The right leg around the calf measures 12 inches; left, 11½ inches; the thigh midway between knee and hip, 16 inches; left, same. Heart—action is normal. There are no murmurs, no increased area of cardiac dullness; both sounds are clear and distinct. Chest measures 31½, 32½, 34½; resonant on percussion; respiration is normal and free from rales. Has worked every day, with the exception of time he had rheumatism. His digestive organs are in fair condition, and he is fairly well nourished. Liver and kidneys are healthy; skin soft and pliable and free from eruptions. His urine is clear and free from sediments, specific gravity 1020, reaction acid, showing neither sugar nor albumen. There is no evidence of general debility. He is now at work upon a section for the Missouri Pacific

Railroad. With the exception of a chronic conjunctivitis, his vision is about the average at his age. He is of small stature and possibly is below his usual weight, and it is our opinion that he is able to do a fair day's work for a man of his age.

The appellant does not testify that he has ever had any sickness, nor is there any statement made by him as to his having been afflicted with any disease, except to the board of surgeons who examined him January 3, 1894, he stated that he had an attack of rheumatism in 1880, which lasted from a week to ten days, and has had slight attacks since. The only exceptional condition which appears in his case is as to his weight, which is under the average of men of his height. The three medical examinations held in his claim disclose no symptomatic conditions of any disease except a slight affection of eyes; and, as before said, it does not appear that he was afflicted with any ailment until 1880, or fifteen years subsequent to his discharge. It is contended that he is feeble. It appears that he is employed as a section hand on a railroad. Whenever his occupation is referred to in the evidence it is mentioned as a railroad hand. So far as appears he has been employed at manual labor for many years, and has been able to follow his occupation continuously.

The medical referee, in a slip dated September 28, 1898, relative to the action in this case, said:

The action of April 29, 1895, rejecting claim for general debility alleged under the general law as an additional cause of disability was improper in so far as the stated grounds for rejection are concerned, i. e., no disability shown therefrom since date of filing.

The medical action was evidently suggested by the legal approval.

The term debility is not used to designate a disease, but is a synonym for feebleness or weakness. It is merely a symptom which may be caused by diverse conditions. It has not been the practice to pension general debility, as such, under the general law since the promulgation of ruling 189 of May 11, 1886. The question is therefore largely a legal one. Viewed from a medical standpoint, general debility should not be considered a cause for pension. If general debility was first manifested in service and has continued during a long period of time, it must be the symptom of a disease, and that disease should be named in the declaration and its origin legally established.

In reference to the practice of naming general debility as a cause for pension under the act of June 27, 1890, it seems to have been prompted by expediency.

Since a certain degree of inability for the performance of manual labor is the necessary condition in the admission of claims under the act of June 27, 1890, and not the cause for the inability, it is not so important that the cause should be stated in the approval.

In the case under consideration the general debility existing appears to be due to pulmonary consumption, and it can not be determined by the papers now in the case when said consumption originated.

In the case of Albert Wise, Company I, Fifty-fifth Indiana Volunteer Infantry, Certificate No. 428514, I had occasion to pass upon the question as to the sufficiency of the allegations contained in the declaration in that case in claim for additional pension on account of rheumatism. The claimant was in receipt of pension on account of chronic diarrhea. In declaration filed November 8, 1889, he alleged rheumatism as

a result of chronic diarrhea; the claim was rejected. In declaration filed October 31, 1895, he alleged rheumatism as incurred while in the service and as an independent cause of disability. Pension on account of rheumatism was allowed to commence from the date of filing the last-mentioned declaration. On appeal the contention was that pension should commence from November 8, 1889, the date on which declaration was filed and in which rheumatism was alleged as a result of chronic diarrhea. Upon appeal I held (October 31, 1898) as follows:

Where the intent is to allege a new disability as the basis of a claim for additional pension, the fact that it is such basis can not be inferred when it is actually alleged as sequella of a pensioned cause of disability; rather if so alleged that fact precludes any such inference. (See L. B., vol. 296, p. 495.)

This rule was not directed to secure observance of any approved form of allegations in declarations. It has reference to substance of statement of facts upon which a claim is based, and requires only such statement as will direct the proofs to the *res gestæ*. So where a disease is alleged as a result of a pensioned cause, though many years subsequent to the first allowance of pension in a claim, no evidence is required tending to show the origin of the newly alleged cause; and if the latter be not alleged as of service origin until several years later no reason appears why pension should be allowed to commence from the filing of the prior declaration in which the allegations are insufficient to direct the proofs to the question to be established, but is specially designed to lead the mind to an entirely different subject.

I am of the opinion that the reasons assigned for the rule in the case cited apply to the facts in this case. General debility is not a disease but a condition due to some cause. Of itself it would signify nothing further as to cause than would the word "sickness," or "feebleness," or "ill health." The appellant uses the words "general debility," words frequently employed by agents and attorneys, instead of "feebleness," or "ill health," or "sickness." Undoubtedly if claimant had used any of the latter in the affidavits filed it would be recited that appellant, while in the service, was feeble, sick, or in ill health, instead of the statement he was suffering from general debility, the words found, and perhaps would be no more descriptive to the minds of the witnesses as to claimant's actual condition than the words used. So the evidence is not directed to show that claimant incurred any wound, disease, or injury in the service. The allegation possibly might serve to discover from what ailment the claimant was suffering, by the aid of a medical examination, and thereupon would follow evidence of claimant having complained of the disease disclosed by the examination while in the service and at times since his discharge. But it is manifest that if he ever did complain of a particular disease he or his attorney would know what disease to allege.

Now, in this particular case, three medical examinations fail to reveal any specific cause of disability except disease of eyes. He is

shown to be a small man; his weight is under proportion as to his height; not robust, but able to continue at hard labor, which he had followed for years. That his condition should grow worse, that he should break down under the strain of hard labor, is not surprising, nor that he should become afflicted with some disease. Now, the fact that subsequently the claimant became physically debilitated proves very little as to causes of disability present at the time the declaration was filed in 1889, and less at a prior date. The fact is that an allegation of sickness, ill health, feebleness, and general debility permits proof of any cause of disability as the basis of the claim. The practice has been to reject claims based on such declarations upon the ground of no ratable disability since date of filing in the event that a medical examination or other evidence fails to disclose the existence of any cause of disability. I fail to be impressed of any inconsistency in this, for the reason that in after years some cause of disability is found producing usual results. It might be suggested with some plausibility that the evidence, as a whole, shows that the cause of disability found did not exist until after the declaration was filed; certainly this would not warrant the reopening of the claim upon any ground.

From a review of the proceedings I am of the opinion that action of rejection in this case upon the ground assigned was proper.

DISABILITY—RATING—MEDICAL EXAMINATIONS.

WARREN THOMPSON.

The degree of inability to perform manual labor is a medical question only so far as a claimant's physical and mental condition is shown by medical evidence. And there is no better evidence, as to his physical ability or inability, than an accurate description of normal and abnormal conditions disclosed by a careful medical examination made by experienced practitioners.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
August 9, 1899.*

Warren Thompson, formerly a private in Company A, Eighth Maine Volunteer Infantry, filed his declarations for pension under the act of June 27, 1890, on December 17, 1890, April 11, 1893, and February 19, 1895. These claims were rejected respectively on September 11, 1891, December 4, 1893, and February 7, 1898, each rejection being on account of no ratable disability. He filed an appeal March 10, 1898, contending as follows:

The Bureau holds that the evidence fails to show a ratable degree of disability under the June act. We appeal from that finding, respectfully contending that it is contrary to the evidence and the facts as they exist.

We have filed evidence of reputable witnesses, who say the applicant is three-fourths disabled for performing labor. The applicant is 63 years of age, as appears from his former applications.

He has been examined several times, the last examination being a "test" examination. The "test" was made by a board in New Hampshire, the applicant living in Maine.

I submit that the finding of the Bureau is not sustained by the evidence. I am aware that the affidavits of his neighbors, who testify as to his actual ability to labor and to his earning capacity, will have but little, if any, weight as against the theories of the medical referee, based upon a more or less accurate medical report of applicant's physical condition made by surgeons who probably never saw the applicant before he appeared before them for a brief examination.

I submit that whether the applicant is disqualified for earning a support by manual labor is a question of fact and not of theory; that it is not a question to be determined by experts, but his ability to earn a support by manual labor should be determined upon evidence of those who know what his actual abilities are to perform labor.

The report of a board shows—if it is composed of skillful and conscientious men who realize the great importance of being thorough in examinations—what the applicant's condition is found to be at the day and hour of the examination. The neighbors of the applicant know what his condition is so far as his physical ability to labor is concerned each day, week, and month.

The witnesses in this case state that applicant is not able to do more than one-third the work of an average able-bodied man.

In order that the several contentions in the appeal be disposed of, it is necessary to review each claim, and the same will be done, that the errors in the contentions set out in the appeal may be clearly apparent.

On February 5, 1891, W. J. Mayberry, a physician, made his affidavit, in which he stated that he examined soldier on said date and found his condition as follows:

That from an injury which he says was received in the service he sustained a fracture of the second, third, and fourth ribs of the right side, and now there is considerable depression of said ribs on the lung, causing difficulty of respiration and a hacking cough. There is also some enlargement of the liver, and he has a slight inguinal hernia which was produced in the service. * * * He is unable to do hard manual labor, though he can do light labor.

He was medically examined on June 17, 1891, and the surgeons reported:

Upon examination we find the following objective conditions: Pulse rate, 84; respiration, 19; temperature, 98.6; height, 5 feet 6 inches; weight, 130 pounds; age, 56 years. He is very nervous. Hands and tongue trembling. He acknowledged using alcohol to some extent, and has had some this morning. There are no physical signs of injury of the chest and stomach, though there are the marks of cupping in several places on the front of the right chest. He complains of great sensitiveness at the front of the right chest, but it is evident that he greatly exaggerates his symptoms. Neither auscultation nor percussion reveals anything abnormal about his respiratory organs. Throat is congested and uvula is elongated.

Heart, liver, and spleen are normal.

There is no hernial protrusion. The ring on right side admits the tip of the index finger. There is slight impulse on coughing, but he can cause no protrusion of the hernia.

We find no evidence of disability, except what we believe to be the result of abuse of alcohol.

We find no other disability.

Under the declaration filed on April 11, 1893, Dr. Bragdon made an affidavit, in which he states:

I have examined the said Warren Thompson several times, and find him ruptured on right side and find right lung diseased. Chronic bronchitis, from which he suffers very much. I further state that I have never doctored him. * * * I attended him for a fractured ulna in the fall of 1892.

On June 5, 1893, John F. Butler and Samuel D. Tibbetts made affidavit that they had known claimant for some forty years; were his neighbors; saw him immediately after his return from service in 1865, and that he was suffering apparently from rheumatism, being lame in his limbs. They further state:

That from year to year ever since said soldier's discharge he has often been lame in different parts of his body with what he supposed to be rheumatism, and at various times he has been obliged to leave his work by reason of said trouble. Said Warren Thompson has also in later years complained of dizziness and palpitation of the heart, and that difficulty has seemed to give him much trouble.

He was medically examined on October 18, 1893, with the following result:

Pulse rate, 78 to 85; respiration, 18; temperature, 98.5; height, 5 feet 6½ inches; weight, — pounds; age, 58 years.

Heart: Sounds normal. Apex beat in fifth interspace 1 inch inside the nipple line.

Good respiratory murmur over both lungs.

No indication of disease of liver or spleen. Skin clear and fair.

No indication of ever having had a fracture of either clavicle.

No indication of injury to right side other than a partial rupture, oblique in character and incomplete. The hernia does not protrude through the external ring—which is about three-quarters of an inch in diameter.

Rheumatism: All joints apparently in good condition. No enlargement of any joints. Stoops and recovers with ease. Gait, good.

Has slight naso-pharyngeal catarrh.

After active exercise, pulse 96.

No other disability is found to exist.

Under his declaration filed on February 19, 1895, Dr. Smith made affidavit in which he states as follows:

I have examined Warren Thompson. I find he has a bronchitis on the right side. His thorax is deformed considerable from several injuries that he has had, having had one rib broken on each side, and the sternum has also been broken. Not much trouble with the heart excepting a general debility affecting all of his organs. Mr. Thompson does not look like a man of vicious habits. I have known him but two months, he having come before me about that time for treatment. I treated him for general debility. I gave him tonics to improve his general condition. I should say he was a worthy applicant. * * * I neglected to say that claimant has a bad inguinal hernia on right side, for which he is wearing a truss.

He was medically examined on May 5, 1897, but the results of the examination will not be set out for the reason that an exhaustive test examination was had later. It should be stated, however, that the board reported:

This claimant is said to be addicted to the excessive use of alcohol, and has general symptoms thereof.

His test examination took place on January 19, 1898, with the following result:

Pulse rate, 76; respiration, 18; temperature, 99; height, 5 feet 5 inches; weight, 125 pounds; age, 64 years.

In the beginning we will say that he says he has the disabilities claimed by him because doctors have told him so.

Disease of the respiratory organs: Measurements forced inspiration 37 inches, forced expiration 35 inches. At rest 35½ inches. We find no evidence of disease of the respiratory organs.

Hernia: We find no evidence of hernia of the right side. There is no tumor in the inguinal canal of any kind. Both testicles are in the scrotum.

Disease of liver: We find the liver normal in size and position.

Disease of spleen: We find the spleen normal in size and position.

Disease of the heart: Apex impulse 1½ inches below and 1 inch to right of left nipple. Apex impulse is not plainly evident to palpation and inspection; area of cardiac dullness and position normal. No murmurs. Rythm, force, and sounds normal. No dilatation, hypertrophy, dyspnoea, edema, or cyanosis. Pulsations of the heart, standing, 92; after brisk exercise, 120.

Rheumatism: We find a grating sensation in the left shoulder on his moving his arm upward and downward. The motion is somewhat limited. The measure around the left shoulder 15 inches. Around the right shoulder 14 inches. All other joints, all muscles and tendons are normal.

General debility: There is no more general debility than what would be expected from his habits, which are known to one member of this board.

Paragraphs 76, 69, 37, 88, 89, and 90 have already been covered. We can get no history of previous attacks of heart disease. Paragraphs from 114 to 130, inclusive, have been thoroughly considered in the claim of each disability.

We have been very particular in regard to examination for hernia as directed.

There is no tumor in the inguinal canal. It does not contain any fold of intestine or omentum. There is nothing to feel hard or soft. We are sure there is no undescended testicle, for both are in the scrotum. There is no enlarged inguinal gland. It is nothing.

It is known to one member of this board at least that the applicant is what is generally termed a "bad character." He is one who does and has indulged in alcoholic stimulants very excessively.

The foregoing is all of the evidence in this case pertinent to the issue raised.

The within appeal states that reputable witnesses say that "the applicant is three-fourths disabled for performing manual labor," but it is noted that not a single witness testifies to any such fact. Not a witness testifies to any stated degree of disability save Dr. Maybury, who says that claimant can not do hard but can do light manual labor. The attorney contends that whether or not claimant is disqualified for manual labor is "a question of fact, not a theory." I am in perfect accord with the proposition, and his case has been and shall be so judged. The facts show that claimant has been, at times, more or less out of normal condition. At his examination on June 17, 1891, he was nervous, and his hands and tongue trembled. Such a condition was, however, to be expected, in view of the fact that he had been indulging in alcoholic liquor shortly before examination. At his examination on January 19, 1898, he showed indications of general debility, which,

the surgeons stated, was to be expected from one of claimant's habits. The general debility testified to by Dr. Smith is reasonably attributable to the same cause. Dr. Maybury, in 1891, stated that there was considerable difficulty in breathing, owing to former fracture of ribs which claimant said he sustained in the service; and yet careful examinations by the examining surgeons fail to disclose any difficulty with the breathing. The neighbors, whose testimony is referred to by attorney, state that he has been lame in different parts of his body for a long space of years, and that lately he has complained of dizziness and palpitation. Examination fails to disclose any affection of the heart, and yet it is not strange, in view of his habits, that claimant should occasionally feel dizzy and suffer from palpitation. It is the general experience of most hard drinkers.

As to the neighbors' testimony, the attorney contends that they ought to know more about claimant's ability to perform manual labor than the doctors or the medical referee. If they do know, in this case, they have failed to say so, for they have not stated in any manner, either directly or inferentially, as to what they think regarding his said ability. They have simply stated that he appeared lame and had to leave his work at various times for what seemed to be rheumatism. These "various times," according to their testimony, extend over a period of twenty-eight years.

A pension claim is decided upon all the evidence in the case, and the degree of inability to perform manual labor is a medical question only so far as a claimant's physical and mental condition is shown by competent medical evidence. The question is not as to how much labor a man does or how often he quits work. It is, How much does his physical and mental condition indicate that he is capable of doing? And in deciding the question we can have no better evidence on which to base a sound conclusion than an accurate description of his physical make-up, and a showing, by competent physicians, the normal or abnormal condition of his body and mind. We can not conclude, because a man is lame in different parts of his body, that he can not earn his support by manual labor. We must know the degree of lameness, the part of the body it affects, and what causes the lameness in order to arrive at any just conclusion. One person will continue to do manual labor while affected with a certain degree of rheumatism, while another person will not labor with much less affection. Should the person who declines to labor be allowed a pension, and the one who does labor be refused one? It is the ability to labor that is the standard, and that ability can best be discovered by a knowledge as to his detailed physical and mental condition, and as to the causes which produce anything abnormal in order that a proper judgment may be had upon the question of permanency.

The evidence in this case shows, as far as any condition which appreciably interferes with claimant's ability to perform manual labor is

concerned, that were he not addicted to the immoderate use of alcoholic liquors, he would be an exceedingly well-preserved man for his years. In fact, he is well preserved in spite of his habits, and is not shown to be materially incapacitated for earning his support by manual labor.

The action appealed from is affirmed.

PAYMENT OF PENSION—RATING—SECTION 4715, REVISED STATUTES.

JOSHUA W. MATTICK.

Pensions being allowed under the general law and act of June 27, 1890, it was proper to adjust the ratings so as to prevent over payment, or double payment of the same pension, or the payment of both pensions for the same period of time, and such deductions and reissues as avoided this and preserved to pensioner the highest ratings to which he was adjudged entitled were not erroneous.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
August 17, 1899.*

An appeal has been filed March 25, 1899, in behalf of Joshua W. Mattick, late of Company H, Twenty-third Ohio Infantry, by David Nation, as "local attorney" of the soldier, and said appeal consists of a general objection to the manner in which ratings have been made in the issuance of a pension, under the general law, to said Mattick. Just what is objected to and what is desired is not clear, because it is apparent that appellant does not understand the status of the case or the basis on which ratings were made. He refers to various increases and deductions and charges for interest on several amounts, and virtually confesses that he is in a quandary as to the method of adjudicating the claims. The only things about which he seems positive are that pensioner, as an old soldier, should not have been charged interest at 8 per cent and that his pension should have been increased to \$50 or \$75 per month.

It is not surprising that appellant is in a state of perplexity, because there have been several issues and reissues of certificates to allow pensions under different laws, to deduct payments under different certificates covering the same period of time, to recover overpayment, and to correct error of ratings. Very few, perhaps, unfamiliar with the law, or with the rules of practice and methods of rating of the Bureau would be able to comprehend all the adjudications in these claims without considerable study or an explanation of the various matters upon which the actions were based.

It is deemed expedient, therefore, in order to make it clear why the changes were made from time to time and to show that the present rating is correct, to recite the facts connected with the history of these adjudications, as well as the reasons on which ratings were based. And

this more for appellant's benefit and that he may understand the whole matter than to decide any particular issue raised by the appeal.

Pensioner first filed a claim September 23, 1879, alleging that in September, 1861, while in service at Beach Mountain, West Virginia, he was kicked by a horse in the abdomen, which caused inflammation of the bowels, resulting in chronic diarrhea. This claim was admitted in 1884, as to chronic diarrhea and resulting piles, at \$4 per month from date of discharge, November 2, 1861, to November 15, 1882, and \$6 per month thereafter. A claim for increase, in which was also alleged disease of lungs of service origin, was filed June 8, 1885, but was rejected October 2, 1886, on the ground that increase of rating was not warranted, and incurrence or existence of disease of lungs in service and at discharge was not shown by any evidence on file.

Pensioner then filed, July 16, 1890, a claim for pension under the act of June 27, 1890, and this was allowed in February, 1891, at \$12 per month from date of filing, admitted disabilities being disease of rectum, liver, stomach and heart, and chronic diarrhea. This rating being greater than that pensioner was receiving under the general law, it was ordered that in paying the larger pension the smaller should be deducted for that period of time between the date of filing, July 16, 1890, and the date when first payment of the new pension should be made. Pensioner should readily understand that as he had received his general-law pension during said period he could not receive the whole of the new pension for the same time, as there is a statute expressly forbidding it. Section 4715, Revised Statutes, is as follows:

Nothing in this title shall be so construed as to allow more than one pension at the same time to the same person or to persons entitled jointly; but any pensioner who shall so elect may surrender his certificate, and receive, in lieu thereof, a certificate for any other pension to which he would have been entitled had not the surrendered certificate been issued. But all payments previously made for any period covered by the new certificate shall be deducted from the amount allowed by such certificate.

Thus, when he took payment under the new certificate it was essential that such portion of the amount therein named as he had already received under the old certificate should be deducted. This was \$6 per month, which being subtracted from the \$12 per month left him but \$6 per month for the time between the dates above mentioned. So, also, it was subsequently discovered or taken notice of that whereas the first pension, that under the general law, had been paid for the whole period from discharge, November 1, 1861, there should have been deducted therefrom such amount as would cover the period of a military service subsequent to that in which the admitted disabilities were contracted, for the law also forbids this, as in Section 4724, Revised Statutes, which is as follows:

No person in the Army, Navy, or Marine Corps shall draw both a pension as an invalid and the pay of his rank or station in the service, unless the disability for which the pension was granted be such as to occasion his employment in a lower grade or in the civil branch of the service.

Pensioner's service in Company H, Twenty-third Ohio Infantry, wherein his disability was contracted, was from May 30 to November 1, 1861. He enlisted again, in Company A, Thirty-third Ohio Infantry, October 14, 1864, and was discharged July 17, 1865. The disability for which he was pensioned was not "such as to occasion his employment in a lower grade or in the civil branch of the service;" hence, as he received pay as a soldier for this service he should not have received pension for the same period. Accordingly, a reissue of his certificate was made in November, 1892, for the purpose of deducting such amount overpaid; that is, \$4 per month for the period of the second service.

Previous to the above-mentioned adjudication, and before the claim under act of June 27, 1890, was made, pensioner had filed, October 13, 1887, a claim for increase of his general-law pension on account of chronic diarrhea and resulting piles and for additional pension on account of bunions on both feet, neuralgia, rheumatism, and disease of heart, alleged to have been contracted in service, and for the kick in the abdomen, originally alleged. This claim was pending for some years, covering the period while the adjudications of the other claim were being made, because the evidence for the purpose of establishing the new disabilities was slow in being filed, and it was found necessary in 1898 to have a special examination held in said new claim. But it was finally acted on November 26, 1898, when the claim for increase for diarrhea and piles was admitted and the claim for the new disabilities was rejected on the ground of no record of the same, and claimant, aided by a special examination, was unable to establish their origin in service or existence at discharge by any competent or satisfactory evidence.

In allowing the increase it was necessary that another reissue of the certificate should be made. The medical examination under said claim was held June 18, 1889, and the increase of rating was granted from that time, as provided by section 4698 $\frac{1}{2}$, Revised Statutes. This increase of rating was to \$8 per month, from date of said examination, to \$10, from December 30, 1890, date of another examination, also showing increase of disability, and to \$12 per month, from April 22, 1898, date of another examination, showing still further increase of disability. A review of the certificates of these several examinations shows that the allowance of such increase was justified and that the ratings given were commensurate with the degree of disability described in each, and especially in the last the rating was full and adequate.

Now, in the payment of this new pension, or increase of the original pension, it became essential to so adjust the same as not to pay two pensions for the same period, and at the same time give pensioner the benefit of the highest rate to which he had been adjudged entitled for the whole period from June 18, 1889, to November 26, 1898. Accordingly it was directed that he be paid at the rate of \$8 per month from June 18, 1889, deducting the \$6 per month he had already received

under the general law. But, inasmuch as he had also received \$12 per month under the act of June 27, 1890, it was further directed that there should be deducted under the new certificate \$8 per month from July 16, 1890; \$10 per month from December 30, 1890, to April 21, 1898, inclusive, and then pensioner was to be paid the \$12 per month under the general law from April 22, 1898, after deducting all payments made from that date upon his certificate under act of June 27, 1890. This, of course, took up the whole amount due to the time of payment under the new certificate.

Thus, as will be seen, pensioner's name was restored to the rolls under the general law, and was allowed the full rating to which his pensionable disabilities entitled him; and while such allowance was of no pecuniary benefit to him except for a limited period, yet the action appears to have been regular in all respects and strictly in fulfillment of the law. Furthermore, as already stated, the ratings allowed were in conformity to the proof as to the degree of disability established. As for interest at 8 per cent, or any other, on any amount or for any time, as appellant complains, of course no charge of the kind has been made or suggested, and it is difficult to understand where appellant got that idea. If he will consider that pensioner has received the highest amounts to which he has been adjudged entitled for the whole period since discharge, under either law, and if in a calculation he will deduct from these highest amounts, as provided by the statutes quoted, such amounts as are necessary to prevent overpayments or double payments of the same pension, or the payment of the two pensions for the same period, he will find that he has received all to which he is entitled under the law.

No point being made in the appeal upon the action taken in regard to other alleged disabilities, it is unnecessary to discuss that portion of the case, or refer to it further than to state that a cursory glance through the reports of the special examination indicates that action as taken is fully sustained. And these additional disabilities not being established as of service origin do not, of course, warrant allowance of pension for them; nor is there anything in the evidence to connect pensioner's present helpless condition from senility with disability contracted in service, so as to warrant a rating of "\$50 or \$75" per month, as claimed. Action in the premises is affirmed.

MARRIAGE AND DIVORCE—DECREE OF NULLITY.

MARY J. VAUGHN (AS WIDOW).

Claimant was pensioned up to January 4, 1870, when she was remarried to one Patton, and the pension was then continued to the minor children until they became 16 years of age. In 1890 she applied to be restored to the rolls, claiming that her marriage to Patton was void because at the time he had a former wife living from whom he had not been divorced, and to sustain said allegation filed a decree of a court, in an ex parte proceeding, nullifying said marriage.

Held: That as the Government was not a party to said nullity proceedings, and as it is shown that said decree was procured by fraud, it is not bound by said decree; and as the other evidence filed to show the invalidity of said marriage is insufficient to show that Patton was previously married, claimant's marriage to him must be held to be valid.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
August 25, 1899.*

This appellant, Mary J. Vaughn (or Patton), on February 9, 1864, filed a claim for pension as the widow of Andrew Vaughn, who was a member during the war of the rebellion of Company G, Eighth Kentucky Infantry, and died while yet in service on June 12, 1863.

Said claim was allowed, Certificate No. 26643, in July, 1864, and pension was paid (with additional pension from July 25, 1866, on account of four minor children) up to January 4, 1870, date of her remarriage to William H. Patton, and was then continued to said children until each became sixteen years of age.

On September 30, 1890, she filed a claim for restoration of this pension, claiming that her marriage to said Patton was invalid and void because he had a prior wife then living and undivorced.

After special examination this claim was rejected in December, 1897, on the ground that her remarriage was valid, the decree of annulment thereof granted in 1892 by the circuit court of Jackson County, Ky., being obtained through fraud and therefore not binding.

She filed this appeal accordingly on March 16, 1898, contending that the Government may not question said decree of annulment, but that it is binding upon the Government herein until and unless vacated by the court which rendered it.

This contention is not sound. This decree was rendered in an ex parte proceeding, the defendant not being served with notice thereof other than by publication and this Government not being a party thereto in any manner. It is well settled that such a judgment may be collaterally impeached for fraud or collusion in its procurement by third parties whose rights may be affected by it (Freeman on Judgments, section 334; Stewart on Marriage and Divorce, section 426; 2 Bishop on Marriage, Divorce, and Sep., section 1567; Webster v. Reed, 11 How., 437; Hale v. Finch, 104 U. S., 261; Railroad Co. v. National Bank, 102 U. S., 14; Butterfield v. Smith, 101 U. S., 570; 1 Greenleaf on Ev., section 523; 5 Am. and Eng. Enc. of Law, 845).

And that the Government may thus contest in a pension claim the validity of a decree of a State court in a nullity proceeding was decided by Assistant Secretary Reynolds in the case of Frances A. Monholland (7 P. D., 494), in which the above decisions on the subject are reviewed at length.

In this case it appears the nullity proceeding was instituted by claimant in 1891, while her claim for restoration of pension was pending. Five witnesses only testified therein by written depositions. One of

these has since died. Another testifies on special examination herein that he has no information except what he obtained from claimant. A third says he knows nothing of a former wife of said Patton except that Patton once remarked it was a "good thing to have two women." A fourth, who had deposed in said nullity proceeding that he had known Patton when he was living with another woman as his wife, testifies on special examination that he never knew or heard of Patton living with or being married to any other woman than claimant. And the fifth witness testified merely that he met said Patton in 1890, in Arkansas, and he was then living with a woman whom he represented to be his wife.

It would appear therefore that Patton's whereabouts while the nullity suit was pending was known to claimant (although she denies it) or to her attorney in that suit, and it would seem, that fact being known, that he should have been personally notified of the suit. He testifies herein, however, that he had no knowledge whatever of it, and that he was, in fact, never married before he married claimant; also, that he left her about 1880 because of her disreputable character. That she was for many years a woman of bad reputation is shown herein. She lived with said Patton for several years before they were married, and before and since their marriage was considered of bad character.

The testimony in said nullity proceeding upon which the decree was based is manifestly insufficient to warrant any such decree and so grossly inadequate that the decree can not but be looked upon as the result of an imposition upon the court and as fraudulently and unconscionably procured. It can have therefore no standing in this case as evidence.

The validity of claimant's marriage to said Patton is fully established. Rejection of her claim for restoration is therefore affirmed.

ADULTEROUS COHABITATION—ACT OF AUGUST 7, 1882.

REBECCA KILBEE (WIDOW).

Adulterous cohabitation of a soldier's widow, on or subsequent to August 7, 1882, terminates her pensionable status.

Section 2 of said act of August 7, 1882, is in no sense a penal statute, nor is to be construed according to the rules of construction of penal statutes, but is remedial and is liberally construed. *Matilda Ague* (9 P. D., 327).

The words "adulterous cohabitation" in said act are not used in their strict legal sense, but in their popular signification, to indicate the open and notorious illicit intimacy indicative of immorality. *Alice Gray* (7 P. D., 134).

Assistant Secretary Webster Davis to the Commissioner of Pensions, August 31, 1899.

Rebecca, widow of Hubbard Kilbee, late private Company C, Eighty-sixth United States Colored Infantry, appealed, by her attorney,

March 31, 1898, from the Bureau action of April 24, 1893, terminating her pension, August 6, 1882, on the ground that she had lived in open and notorious adulterous cohabitation with one Ezekiel Goodson since the passage of the act of August 7, 1882.

It is contended, by her attorney, that as claimant is a colored woman and said Goodson is a white man, and that claimant's marriage to Goodson, May 28, 1880, was illegal and void under the laws of the State of Florida, where they were married, that her cohabitation with him was not adulterous, as neither of the parties were married, and that to constitute adulterous cohabitation one of the parties at least must have been a married person, citing authorities; and that claimant was not a pensioner on August 7, 1882, and that, therefore, the act of that date could have no application to claimant.

Soldier enlisted October 6, 1864, and died in service May 7, 1865. He was married to claimant February 5, 1865.

Claimant was pensioned as his widow from the date of his death to August 7, 1882, when it was terminated for the reasons hereinbefore stated.

The evidence shows that claimant cohabited with said Goodson, a white man, in the State of Florida, about a year prior to her marriage to him on May 28, 1880, in said State, one child being born as the result of said cohabitation before marriage; that within a few days after her said marriage to Goodson she was advised that her marriage to Goodson was illegal and void under the statutes of Florida, but that she continued to live and cohabit with the said Goodson for some six years, and five years after their marriage in 1880, five children being born as the result of said cohabitation.

It is conceded by claimant's attorney that by the statutes of Florida the marriage of claimant to Goodson was void, and claimant, on March 20, 1895, testified before the special examiner that she learned from Mr. Frank Phillips, only a day or two after their marriage, that she was not legally married to Goodson, but that she continued to live with him four or five years.

The words "adulterous cohabitation," as used in section 2 of the act of August 7, 1882, are not to be read in their strict legal sense, but were evidently used by Congress in their popular sense to indicate the open and notorious illicit intimacy indicative of immorality.

In the case of Jennette Thompson (7 P. D., 262) it was held that the act of August 7, 1882, was in no sense a penal statute; that it neither commands nor forbids the doing or omission of any act; that it simply provides a condition which renders the widow of a soldier nonpensionable from the date of the passage of the act; that it prescribed no penalty any more than does the provision that a widow's pension shall cease upon her remarriage, or that a minor's pension shall cease upon the minor attaining the age of 16 years, or that a dependent parent's pension shall cease when dependency ceases.

I am of the opinion that Congress did not attempt to define a crime in stating the condition which should terminate the widow's pensionable status. As was held in the case of Alice Gray (7 P. D., 134):

It is clear that Congress, by the use of the words "adulterous cohabitation of a widow," did not employ the word "adulterous" in its technical signification. To hold otherwise would render the provision inoperative.

So, also, to hold strictly to the phrase "who is a pensioner" would lead to an equally absurd conclusion, and result in pensioning a widow who, if she were in receipt of a pension, would be dropped from the rolls under said act. The construction of the language of said act, "who is a pensioner," was fully considered in the case of Sarah J. Grooms (7 P. D., 207), where the absurdity of a strict or literal construction was illustrated by the facts in that case. The words "who is a pensioner" were held to include a widow who was an applicant for a widow's pension, and the Sarah E. West case (3 P. D., 115), and the case of Cynthia Evans (5 P. D., 188), and other similar cases, so far as they were in conflict with the Grooms case, were in terms overruled. It was said in the concluding paragraph of the Grooms case that—

The act in terms simply operates to forfeit the right to continuance of the pension when the conditions named in the statute are established, and if found to exist when the application is made, or while pending, such forfeiture is destructive of all title to pension.

As was said in the case of Eliza Fain (7 P. D., 572):

The gravamen of the widow's offense does not lie in the fact that she was a pensioner when she committed the adulterous acts, but in the fact that her conduct was subversive of public decency and law and of such a character as would have caused her to forfeit all claim to support by the husband if he were living. The law does not say if a widow whose pension has been terminated by reason of open and notorious adulterous cohabitation thereafter reforms and lives chastely she may have her pension restored. She forfeits not only the pension then due, but the right to such pension for all time. But no reason can be given why such conduct would work permanent forfeiture of a pension already granted that is not as equally strong reason why it should be a bar to the allowance of any future claim for pension. It is not to be believed that Congress when it declared, in effect, that the open and notorious adulterous cohabitation of a widow pensioner should operate to annihilate her right to pension intended that a widow who was not a pensioner might indulge in such cohabitation as long as suited her interest or inclination and then, whenever she so desired, exchange a paramour for a pension. The purpose of the law was to prevent the pensioning of widows after they were found to have been guilty of open and notorious adulterous cohabitation. From the time that such cohabitation is established (since August 7, 1882) their right to pension is gone. See also the case of Matilda Ague (9 P. D., 327).

I am of the opinion that the action appealed from was fully justified by the evidence and the same is accordingly affirmed.

The papers in the case are herewith returned.

EVIDENCE—SUFFICIENCY OF—CIRCUMSTANTIAL EVIDENCE.

SYBILLA HEINZ (WIDOW).

Soldier, after repeated failures to obtain work, both mentally and physically enfeebled by a wasting and incurable disease, with starvation staring him in the face, his wife dangerously ill in a public hospital, and with no prospect or hope of relief in the immediate future, declared his intention to take his life, and thus put an end to his misery in this world. Immediately thereafter, on July 22, 1887, he disappeared, and although it was not absolutely or positively known, it was universally accepted and believed, as a fact, by all conversant with the circumstances at the time, that he had thrown himself into the Mississippi River and was drowned. These facts were accepted by the Bureau of Pensions as sufficient to raise the presumption of the fact of soldier's death under the provisions of the act of March 13, 1896, but not sufficient to raise the presumption of death prior to the expiration of seven years after his disappearance.

It is held that the evidence in this case is sufficient to show the death of soldier on July 22, 1887, and to entitle the widow to pension under the act of June 27, 1890, and March 6, 1896, from the date of filing her first application, September 22, 1890.

Assistant Secretary Webster Davis to the Commissioner of Pensions, August 31, 1899.

Sybilla Heinz filed in the Pension Bureau on September 22, 1890, her original application for pension under the provisions of section 3, act of June 27, 1890, as widow of John Heinz (deceased), late private, Battery A, Second Missouri Volunteer Light Artillery, alleging that said soldier had disappeared from his home and family on July 22, 1887, and was supposed to have committed suicide on or about that date, leaving her without other means of support than her daily labor.

The date of filing said application being within the period of seven years from the date of the alleged disappearance of the soldier she was required to file a second application for widow's pension under said section, which she did on July 11, 1898, and this application was admitted on July 20, 1898, and on July 23, 1898, pension was allowed her as the widow of said soldier at the rate of \$8 per month from July 11, 1898, the date of filing said second application.

From the action commencing said pension from the date of filing said second application, as aforesaid, this appeal was taken on August 14, 1899.

It is contended by the appellant that the facts established by the evidence in this case in connection with the disappearance of the deceased soldier are sufficient to justify the conclusion that his death occurred on or about the date of his disappearance, July 22, 1887, and establish his death as a fact within the period of seven years from said date, and long prior to the date of filing her first application for pension as his widow.

A special examination of this case developed the following facts relative to the disappearance of the soldier about which there appears to be no room for doubt or controversy.

The soldier and the appellant were poor laboring people residing in the city of St. Louis, Mo., he being by trade a hod carrier. The soldier's health became seriously and permanently impaired by disease of lungs (consumption), so that he was unable to endure the hard labor incident to his calling, and had to give up his job and seek less arduous employment. He was unable to obtain other work, his health steadily declined with the progress of his disease, he became very feeble, melancholy, and was at times mentally unbalanced, as is shown by the fact that he was for a time treated in hospital on account of his mental condition a short time before he disappeared. In the meantime this appellant had endeavored to earn a support for herself and the soldier by taking in washing, and doing other such work, but about a year prior to the soldier's disappearance her health also failed, and she was unable to earn even the small pittance that had so far kept them alive.

The evidence shows that they were compelled to pawn and sell all their household effects, except one or two absolutely necessary articles, to avoid starvation, and in July, 1887, the appellant was taken seriously and dangerously ill and had to be sent to hospital.

Under these circumstances, after repeated failures to obtain work, both mentally and physically enfeebled by a wasting and incurable disease, with starvation staring him in the face, his wife dangerously ill in a public hospital, and with no prospect or hope of relief in the immediate future, the soldier, who was rather an ignorant German, declared his intention to take his own life and put an end to his misery in this world. Immediately thereafter, on July 22, 1887, he disappeared, and although it was not absolutely or positively known, it was universally believed and accepted as a fact by all conversant with the circumstances at the time, that he had thrown himself into the Mississippi River and was drowned. His body was never recovered, or if recovered was unrecognizable, and although such effort as the limited means of the appellant and her friends permitted was made to trace him, nothing has ever been seen, heard, or known of him since said date.

These facts were accepted as sufficient to raise the legal presumption of the fact of the soldier's death under the provisions of the act of March 13, 1896. Said act did not in any way change, modify, restrict, or limit the meaning or scope of the well-known common-law rule relative to the presumption of death after seven years unexplained absence. It was merely, as has been declared by this Department on more than one occasion, a legislative restatement of said rule, and simply required its application in the consideration of claims filed under the pension laws, where the facts proved were such as to raise such a presumption, and pension cases involving a question of presumption of death from seven years' unexplained absence, arising under said act, are to be considered and determined by the same rules, considerations, and authorities as obtain and control in the consideration of such questions arising at common law.

All authorities agree that the legal presumption of death from seven years' unexplained absence goes merely to the *fact* of death and not to the *time* of death.

Up to the lapse of seven years the presumption of the continuance of life obtains, and the burden of proof lies upon the party asserting the death within that period. After the lapse of seven years, without intelligence concerning the person, the presumption of death obtains, and the burden shifts to the other party; but there is no presumption as to the time when the person died, and the burden of proving his death at any particular time is upon the party who asserts it. (Greenleaf on Evidence, section 41, and authorities cited in note b, thereto.)

There is no presumption as to the death within the seven years. (Davie v. Briggs, 97 U. S., 628; Spencer v. Roper, 13 Ired. (N. C.), 333; State v. Moore, 11 Id., 160; McCarter v. Camel, 1 Barb. (N. Y.), ch. 455; Hancock v. American Life Ins. Co., 62 Mo., 26.) Consequently, although the fact of death will not be presumed until the end of seven years, the actual time or date of the death within the seven years may be proved as a fact by direct or circumstantial evidence.

The most usual form of such evidence is that which shows that the person in question was either in such a bad state of health that it is probable that he is dead at the time specified, or that he has been exposed to some specific danger, such as shipwreck or railroad collision, which renders it probable that he was then destroyed.

This and similar evidence will justify the finding of death at a specific date inside of the seven years by the jury, but mere unexplained absence short of that time will not. (Greenleaf on Evidence, section 41, note b, and authorities there cited.)

While, therefore, the procedure adopted in this case is a safe and proper practice to follow as a general rule, and in all cases where the evidence is not sufficient to establish the time of death at some date within the period of seven years unexplained absence, yet in this case I am decidedly of the opinion that the facts established by the evidence unmistakably point to the soldier's death as having occurred at or about the date of his disappearance, and should be accepted as sufficient to establish his death prior to the filing by this appellant of her first application for pension in the absence of any fact or circumstance in evidence leading to a different conclusion. He is shown to have been poor, out of work, in feeble health, the victim of an incurable disease, mentally unbalanced, placed at the time under most painful and distressing circumstances, in actual want of the bare necessities of life, with no prospect of relief. In this condition and with these surroundings he declared his intention to commit suicide, and immediately disappeared, and no trace of him has since been found. The soldier belonged to a class of Germans which statistics show are exceedingly prone to self destruction when subjected to great misfortune or intense mental suffering and anxiety, and all the surrounding circumstances indicate in the strongest and most convincing manner that he carried out his declared intention and put an end to his existence on or about the date of his disappearance.

I am therefore of the opinion that the evidence should be accepted as sufficient in this case to show the death of the soldier on July 22, 1887, the date of his disappearance, and, consequently, the action commencing appellant's pension from the date of filing her second application, July 11, 1898, is hereby reversed and set aside, and you are requested to reissue her certificate so as to make said pension commence from September 22, 1890, the date of filing her first application for pension under section 3, act of June 27, 1890, as widow of said soldier.

DECLARATIONS—EXECUTION OF PAPERS—ALABAMA STATUTE.

SEABORN WILLIAMS.

Within the contemplation of the law, in the State of Alabama, the official act of the clerk of a probate judge therein is the official act of said judge; therefore, a declaration for pension is made before said judge if executed in the presence of his clerk only, and is legally executed within the purview of section 4714, Revised Statutes, and the act approved July 1, 1890.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
September 20, 1899.*

The claimant, Seaborn Williams, served in Company H, One hundred and thirty-seventh United States Colored Volunteer Infantry, from April 8, 1865, to January 15, 1866.

On July 17, 1890, was filed his declaration for pension under the act of June 27, 1890; the claim was rejected February 25, 1898, upon the ground that the declaration was invalid—

* * * the name of the probate judge, A. E. Coffee, before whom it purports to have been executed was signed by J. J. Meadows, probate clerk of the court, who is without legal authority to administer oaths.

From this action an appeal was entered June 7, 1898.

The declaration purports to have been executed before A. E. Coffee, probate judge, Lowndes County, Ala., July 12, 1890. The seal of said court is attached. The signature to the certificate of execution is as follows: "A. E. Coffee, Judge Probate."

A special examination of the claim developed that in fact the execution of the declaration was before J. J. Meadows, clerk of the probate court, who signed the name of the probate judge to the certificate of execution and affixed the seal of the court thereto.

There is no pretense of fraud, or any attempt at deception. The question is whether the execution of the declaration is in accord with the law relative thereto.

Section 4714, Revised Statutes, provides that—

Declarations of pension claimants shall be made before a court of record or before some officer thereof having custody of its seal, said officer hereby being fully authorized to administer and certify any oath or affirmation relating to any pension or application therefor.

And by act approved July 1, 1890, declarations to be hereafter made or used in any pension case may be taken—

* * * by any officer authorized to administer oaths for general purposes in the State, city, or county where said officer resides.

Probate courts of the State of Alabama are courts of record. (See provisions of chapt. 92, Civil Code of Alabama, 1896; *Knabe v. Rice*, 106 Ala., 516.) On its face, therefore, the certificate of execution of the declaration is valid. For, by section 4714, Revised Statutes, the judge of a court of record is authorized "to administer and certify any oath relative to any pension or application therefor."

Now, in the contemplation of the law, was the declaration executed before said judge, the facts being as above set forth?

Section 702 of the Civil Code of Alabama (1876) provides that the judges of probate have authority—

1. To administer oaths and take and certify the same in which the administering such oaths and taking such affidavit is not conferred expressly to some other officer.

6. To employ at his own expense a clerk for whose official acts he is responsible; and such clerk shall have the following powers: 1. To do all acts not judicial in their character. * * *

The judge of probate in Alabama is authorized to administer oaths for general purposes. Such acts are not judicial, as there is no question to be determined. The act is ministerial. The clerk of the probate judge is authorized to do all acts not judicial in their nature.

The ground of rejection assigned by the Bureau contains an assertion as a fact that the declaration was not executed before the judge of probate but before his clerk. However, the legal question, viz, Whether, in law, the certificate of execution was made by the judge of probate, must not be lost sight of. The facts are that the clerk of the probate judge administered the oath and affixed the signature of the judge to the certificate of execution.

In the case of *Halso v. Seawright* (65 Ala., 432), the facts were as follows: Real action for the recovery of lands. Plaintiff deduced title to the lands from a mortgage—

* * * the acknowledgment of which is in due form, purporting to have been taken and certified by the judge of probate of the county of Butler. It was shown by parol without objection that the acknowledgment of the execution of the mortgage was not taken by the judge of probate, but was in fact taken and certified by his clerk duly appointed.

So the signature of the judge of probate was signed by his clerk, without addenda showing that it was thus written, to the certificate of acknowledgment, and the act was before the clerk. These particulars as to facts are like those arising in the case under consideration.

Relative to the question of law arising in the case of *Halso v. Seawright*, the court said:

Where on the probate judge was devolved the duty of taking and certifying the examination of the wife to an alienation of a homestead, the preexisting statute

intervened and authorized the clerk of his appointment, and in his name to take and certify it. For all legal purposes, and in contemplation of law, the act of the clerk is the act of the judge. Unlike the clerk of the circuit court, or the register in chancery, or the clerk of this court, the clerk of the probate court is not an independent officer clothed with distinct official power and duty to be exercised upon his own responsibility. He is a mere agent or deputy acting for and in the name of a principal who is answerable for his fidelity. It is the power of the principal he can exercise, so far as the law permits its delegation.

So, by the laws of the State of Alabama, the official act of the clerk of a judge of probate is the official act of said judge. Hence, in contemplation of the laws of said State, the execution of the declaration in this case before such clerk was before the judge of probate, as much so as if it had been made before the person who held said office.

There is nothing in the wording of either section 4714, Revised Statutes, or the act approved July 1, 1890, warranting the belief that anything further was required in the execution of a declaration for pension than that the act of execution should be performed before one of the officers coming within the specified classes in that manner in which such officer is directed and permitted to perform his duties, and in that sense contemplated by the laws of the particular State in which said act takes place.

Therefore, in conformity with the construction of the laws of Alabama made by the supreme court of that State, it must be held that the certificate of execution to the declaration filed in this claim is the certificate of the probate judge of Lowndes County in contemplation of those laws.

Said judge was at least an officer of a court of record, and was also authorized by law to administer oaths for general purposes. In either capacity he was competent to certify to the execution of the claimant's declaration for pension at the date it was made.

As the declaration was legally executed before an officer specified by the law for the making of the same, the action of the Bureau in rejecting the claim upon the ground assigned was error. Accordingly, said action is reversed, with directions to readjudicate in accordance herewith.

MARRIAGE AND DIVORCE—EVIDENCE.

SARAH NEWBERRY (WIDOW).

Claimant maintained an illicit relation with one Henry Davis from about 1869 to 1882, in the States of Illinois and Missouri, when they separated and both married thereafter, Davis marrying in Sedalia, Mo., in 1884, and claimant marrying soldier in 1885, by a ceremony, with whom she lived as his wife until his death in 1891. Claimant and Davis both swear that they were never married to each other, and the evidence does not show that they were ever regarded as husband and wife in the communities where they lived.

Held, That the cohabitation of claimant and Davis was illicit and not matrimonial, and that her marriage to the soldier was valid.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
September 20, 1899.*

Sarah, alleged widow of Lewis Newberry, late private Company G, Fifty-fifth Massachusetts Colored Infantry, appealed March 9, 1898, from the Bureau action of October 31, 1895, rejecting her widow's claim, No. 517725, filed June 23, 1891, under the act of June 27, 1890, on the ground that she is not the legal widow of soldier, being the legal wife of Henry Davis by a prior marriage.

It is contended that the evidence shows that claimant is the widow of soldier, and that she was never the wife of Henry Davis.

The evidence in this case shows that soldier enlisted June 5, 1863, and was honorably discharged August 29, 1865; that a ceremonial marriage was performed between soldier and claimant by the Rev. C. H. Webb at his house in Hannibal, Mo., on the 30th of May, 1885; that the soldier and claimant after their marriage continued to live and cohabit as husband and wife in Hannibal, Mo., up to the time that soldier was taken to the insane asylum about a year and a half before he died, which was February 19, 1891.

The evidence further shows that the soldier had been previously married, but that his first wife died October 5, 1884, and prior to his marriage to claimant; that claimant prior to her marriage with soldier had cohabited with one Henry Davis in Illinois and Missouri for some thirteen years, or from about 1869 to 1882, when they separated and both married other parties, claimant marrying soldier as aforesaid, and Davis marrying in Sedalia, Mo., in 1884.

Both claimant and Davis testify that they just took up with each other; that there was no marriage ceremony performed or any pretense of any, and that they were never married to each other. The special examiner reports that he believed they stated the facts. An examination fails to disclose any evidence of marriage between them aside from cohabitation and the fact that claimant had three children by Davis.

Rev. O. H. Webb, the clergyman who married claimant to soldier, testified before the special examiner that he saw Henry Davis at claimant's house before her marriage to soldier, and that they were living together, but he heard they were never married; that he had known claimant for twenty years and that she was married to soldier under the name of Sarah Schropshire.

Stephen W. Holder, white, reputation good, testified before the special examiner that he had known claimant all his life; that he found her living in Hannibal, Mo., with Henry Davis, but Davis went away some time before claimant was married to soldier; that he did not know whether they were married or not; that Davis didn't stay with claimant all the time as a man would that was married to his wife.

Ida Slayton, aged 23, a daughter of soldier by his first wife, testified before the special examiner that she did not know whether claimant was ever married to Henry Davis or not, but thinks claimant told Rev.

Mr. Webb, when she was married to soldier, that she had never been married before.

No witness has been found who could testify that claimant and Davis were regarded as husband and wife by their acquaintances, friends, or neighbors.

Several witnesses have testified to the illicit relations between claimant and Davis; that they were never married or regarded as husband and wife; that Davis always contended that she had no claim on him as her husband, never spoke of her as his wife nor she of him as husband; that some of her friends remonstrated with her for her manner of living with Davis, and urged her to marry him; that she refused, stating that she would never marry him, stating as a reason that Davis was "so overbearing, dissipated, and mean to her;" that they finally ceased living together, Davis leaving Hannibal, and claimant returning to one of her friends, Mary Newbolt, with whom she lived till she married soldier. There is no evidence of collusion between claimant and Davis or her witnesses.

While common-law marriages are valid in the State of Missouri (64 Mo., 552), and such marriages may be proved by evidence of cohabitation and general repute, yet the evidence in this case wholly fails to establish general repute in the sense in which that term is defined by the courts.

As stated by the court of appeals in the case of *Barnum v. Barnum* (42 Md., 251)—

Marriage may doubtless be proved in civil cases, other than in actions for seduction, by the actions and conduct of the parties, but where reputation is relied on, that reputation to raise the presumption of marriage must be founded on general and not on divided or singular opinion; and where reputation in such a case is divided, it amounts to no evidence at all.

See also *Boone v. Purnell* (28 Md., 607, 627); *Cunningham* (2 Dow., 482, 511); *Yardley* (75 Pa. St., 207, 212); and *Bishop on Marriage, Divorce, and Separation*, par. 936 and note 5.

I am of the opinion that the evidence in this case not only fails to prove prior marriage of claimant, but on the contrary shows that claimant's relation with Henry Davis was illicit, not matrimonial.

Cohabitation and general reputation alone never constitute marriage, although they are facts from which marriage may be presumed. *Yardley's Estate* (25 P. F. Smith, 25); *Reading Fire Insurance and Trust Company* (113 Pa., 204); *Hunt's Appeal* (86 Pa. St., 294); 1 *Bishop, Marriage, Divorce, and Separation*, par. 633; *Stuart on Marriage and Divorce*, par 46, and *Ann Blue* (7 P. D., 122).

The evidence also establishes a ceremonial marriage between claimant and soldier Lewis Newberry, on May 30, 1885; and the law presumes the legal capacity of the parties to contract the marriage relation. (*Mary C. Buckley*, 8 P. D., 195.)

It therefore follows that the Bureau action rejecting her claim on the grounds stated was error, and said action is accordingly reversed, and the papers in the case are herewith returned.

MARRIAGE AND DIVORCE—EVIDENCE—ADMISSIONS.

MARY ANN JONES (WIDOW).

Claimant first stated that she was previously married to one Neil in the Isle of Man, England, by whom she had one child, a daughter, and that her said husband was dead. Evidence taken on special examination shows claimant's maiden name to have been Neil, and that her daughter was the fruit of an illicit relation with a man in England, and claimant now admits this, claiming that she had represented herself as a widow to conceal from said daughter that she was an illegitimate child, and it is held that there was no impediment to her marriage to the soldier.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
September 20, 1899.*

Mary Ann Jones filed in your Bureau on June 26, 1891, an application for pension under the provisions of section 3, act of June 27, 1890, as the widow of Thomas Jones (deceased), late private Company C, One hundred and thirty-first New York Volunteer Infantry, alleging the death of said soldier on May 7, 1880, leaving her without other means of support than her daily labor. Said claim was rejected on February 11, 1899, upon the ground that she had another husband who was not divorced from her and who was not shown to be dead at the date of her marriage to the soldier.

From said action appeal was taken on April 20, 1899.

It was alleged by this appellant that both the deceased soldier and herself had been twice married prior to their marriage to each other. The evidence shows the death of both of the previous wives of the soldier prior to his marriage to this appellant. The appellant at first alleged that she was first married, about 1858, to one Robert Neil, or Kneale, in the Isle of Man, England, before coming to this country, by whom she had one child born, a daughter named Louisa, with whom she is now living and who is supporting her. She testified on several occasions that her alleged first husband Neil, or Kneale, died in the Isle of Man before she left there, and she filed a duly certified transcript from the "Registry Book for Burials" in the parish of Kirk Braddon in the Isle of Man, showing that one Robert Kneale, aged 20, had died and been buried there on October 26, 1852, whom she declared under oath to be identical with her first husband. She appears to have lived in Liverpool, England, where her daughter Louisa was born, in domestic service for some years, during the time of the civil war in this country, and to have come from that place to New York City about 1865 with an American family, with whom she lived for some years as a domestic servant, during which time she was known as Mrs. Neil, and her daughter as Louisa Neil, and to have married in the latter city her second husband, one Henry Bull, who is shown to have died on January 16, 1873. The evidence shows that the appellant and the deceased soldier were married in March, 1877. It appeared from the statements of the appellant herself, the testimony of her daughter

Louisa, and a comparison of dates, that the Robert Kneale who died in the Isle of Man in 1852, and a record of whose burial was furnished by appellant as above mentioned, could not have possibly been her first husband and the father of Louisa. The case was, therefore, specially examined, when the appellant at first reiterated her former statements relative to her first marriage to Neil, or Kneale, but upon being confronted with the inconsistencies and incongruities of her story, and on skillful cross-examination she confessed very reluctantly that she had never been married prior to her marriage to Bule, and that Louisa had been born out of wedlock. In view of her repeated sworn statements that she had been married to the father of Louisa before she came to this country, it was deemed that the death or divorce of her first husband was not shown and the validity of her marriage to the soldier not satisfactorily established, and her claim was rejected solely for this reason.

I am of the opinion that the evidence in the case will not sustain this conclusion. In the first place, the only evidence in the case, of any kind whatever, tending to show that the appellant had been married prior to her marriage to Bule in New York City is her own statement to that effect. Although, as a rule, the admissions of a party against his own interest are to be taken most strongly against him and can not be offset by other statements in his own favor, the circumstances of this case seem to be peculiar, and present considerations which tend very strongly to the conclusion that the latter statement of this appellant is the true one and gives the real facts in the case. Although the appellant appears to have been an ignorant and uneducated person, and a domestic servant until her marriage to Bule in New York City, she at the same time is shown to have led a most reputable life and to have been greatly respected and trusted by those who employed her, and to have had a high sense of self-respect and personal honor. The confession that she had never been married to the father of Louisa was drawn from her with great difficulty, and only after careful and skillful cross-examination, and was made with the greatest reluctance, only after she was confronted with the fact that her first story would not conform to the facts in her case concerning which there could be no controversy. She stated at the time that this had been the secret of her life, and that her one and controlling motive for many years had been to conceal the fact of her early shame and disgrace and to protect her daughter from the social stain and ignominy incident to a knowledge of her illegitimate birth, until it had "become a second nature with her," and she was only led to state the true facts when she could no longer help herself. The evidently sincere and genuine grief and shame of the appellant when the confession of her youthful indiscretions was forced from her, and the very apparent fact that, in her mind at least, this circumstance in her life was what it was most important for her to conceal, precludes the idea that her last statement had been made for the purpose of bolstering up and aiding in the prosecution of this claim for pension as the widow of the soldier. It is very apparent from the

circumstances of this case, and the manner in which it was made, that the statement by the appellant that she had never been married to the father of her daughter in England, was what was deemed by herself as a confession against her own interests, and that she would have willingly sacrificed all her claim and title to pension could she have avoided making it.

Furthermore, the appellant's last statement is fully corroborated by the testimony of an older sister, now living in Lincoln, Nebr., and reported to be of good character and standing and a thoroughly reliable and credible witness. She swears that the appellant was living with her in Liverpool, England, when her daughter Louisa was born, about June, 1859, and that the child was illegitimate, as the appellant was not married then, and never was married until after she came to this country and married Bule in New York City. She also testifies that the appellant's maiden name was Neil or Kneale, and that she called herself Mrs. Neil after Louisa's birth, in order to conceal the fact that she was a single woman. This witness, also, is reported by the special examiner to have testified very reluctantly to the fact that her sister, this appellant, had given birth to an illegitimate child. In view of this evidence and the other circumstances in the case above mentioned, I am convinced that the last story of the appellant is the true one, and I am of the opinion that the evidence is not sufficient to establish the existence of a marriage of the appellant in England prior to her alleged second marriage to Bule in New York City, notwithstanding her repeated statements to that effect first made in this case.

If the marriage of appellant to the father of Louisa in England is not established, then, clearly, no legal impediment to her marriage to the deceased soldier is shown to have existed, and said marriage was legal and valid and she must be accepted as his widow under the evidence in this case.

The rejection of this claim upon the ground stated is, therefore, hereby reversed and set aside, and you are requested to cause the same to be reopened and readjudicated upon its merits, accepting the appellant as the deceased soldier's widow.

RATE-RANK-DEPENDENT PARENTS-ACT JUNE 27, 1890.

ELIZABETH DARLING (MOTHER).

Pensions for dependent parents are rated in accordance with the provisions of section 4707 of the Revised Statutes as amended by the act of March 19, 1886, the first section of the act of June 27, 1890, only amending said section to the extent of requiring claimants to prove present dependence instead of dependence at the date of the son's death.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
September 22, 1899.*

Replying to your inquiry of June 30, 1899, in connection with the departmental decision of June 21, 1899, in the dependent mother's claim

of Elizabeth Darling, mother of Franklin Richard, certificate numbered 127951 (10 P. D., 244), as to whether it is to be—

understood that the rank of a soldier in the service is to be taken into consideration in those cases where the dependent parent has filed an application subsequent to June 27, 1890, and relies upon present dependence to prove the claim,

I have to say that the rank of the son of a dependent parent claimant is to be taken into consideration in those cases where application is filed subsequent to June 27, 1890, the same in all respects as if the application was filed prior to June 27, 1890.

For reasons stated in said departmental decision of June 21, 1899, the last proviso to section 2 of the act of June 27, 1890, that "rank in the service shall not be considered in applications filed under this act," does not, and was not intended to, apply to dependent parents' claims filed under section 4707, Revised Statutes, as amended by the first section of the act of June 27, 1890, but was intended to apply *only* to those beneficiaries who were designated in sections 2 and 3 of said act, and whose rate of pension, as well as title, was created by that act.

Had Congress intended to repeal the provisions of section 4707 and reduce or in any manner modify the rate of pensions of dependent parents, that intent would have been manifested by clear, apt, and appropriate language. Repeals by implication are not favored. (South-erland on Construction of Statutes, paragraphs 138 and 151.)

Sections 2 and 3 of the act of June 21, 1890, provided for a new scheme of pensions having no reference to disability or death due to army service, while section 1 of the act of June 27, 1890, related to the old scheme, requiring disability or death to be the result of military or naval service. The scheme of abolishing rank rate refers, naturally, to the new scheme, and not to the old.

As stated by Southerland on Statutory Construction, section 147, page 199:

The reenactment of some of the sections of one act, in a subsequent one providing for a different scheme, is not a repeal by implication of these sections of the first act; nor does a provision in the second act suspending the operation of the similar sections in that act have the effect to suspend the operation of those in the first act.

The language used in said proviso to section 2 of the act of June 27, 1890, applies only by its plain terms to applications "filed under this act," and has no reference, by implication even, to applications that are filed under an act that was amended merely as to a matter of proof by the first section of said act of June 27, 1890.

The right of a dependent mother to "the same pension as such officer or other person would have been entitled to had he been totally disabled" has existed since July 14, 1862. (See Digest of Pension Laws, 1885, p. 496, sec. 3; 12 Stat. L., 566, 567.)

The first section of that act provides the rate for officers, noncommissioned officers, musicians, and privates, for a total disability.

Said section 3 of the act of July 14, 1862, then provided:

That when any officer or other person named in the first section of this act shall have died, * * * or shall hereafter die, by reason of wounds received or disease

contracted while in the service * * * and in line of duty, and has not left, or shall not leave, a widow or legitimate child, but has left or shall leave a mother who was dependent upon him for support, in whole or in part, the mother shall be entitled to receive the same pension as such officer or other person would have been entitled to had he been totally disabled.

This grant to the dependent mother is now embodied in section 4707, Revised Statutes, and Congress, instead of showing any disposition to reduce the rate of the mother's pension, increased the rate of those dependent mothers whose sons were not commissioned officers from \$8 to \$12 per month by the act of March 19, 1896, thus amending section 4707 as affecting the dependent mother's rate.

It is to be borne in mind that said act of March 19, 1886, only applied to those who were entitled to receive a less rate than \$12 per month, and in no manner affected those dependent relatives who were entitled to receive a rank rate of pension, or a rate in excess of \$12 per month.

If it is contended that the dependent parents' rate is fixed by the act of June 27, 1890, then the rate of the dependent parent should be \$8, not \$12, per month, as \$8 per month is the only rate provided for dependent pensioners in the act of June 27, 1890. Why, then, are dependent parents' claims adjudicated at \$12 per month, \$4 per month more than the dependent widow receives under the act of June 27, 1890?

If it be said that the dependent mother's rate is fixed by the act of March 19, 1886, as heretofore stated, a mere reference to that act shows that it only referred to and included within its provisions those—widows, minor children, and dependent relatives * * * entitled to receive a less rate than * * * \$12 per month.

As the widow or dependent mother was at that date entitled to receive the rank rate of their husband or son, and as the lowest rank rate was more than \$12 per month, the widow or dependent mother entitled to a rank rate were not the beneficiaries named in the act of March 19, 1886, and were not affected thereby.

If, then, the rate of a dependent mother whose son was a commissioned officer was not fixed at \$12 per month by the act of March 19, 1886, where is the authority in any law to grant her a pension of \$12 per month, and what law fixes her rate? Clearly the act of July 14, 1862, sections 1 and 3, paragraph 12, Statutes at Large, pages 566, 567, and now embraced in sections 4695 and 4707, Revised Statutes.

To hold that the proviso to section 2 of the act of June 27, 1890, that "rank in the service shall not be considered in applications filed under this act," repeals, by implication, the provision as to rate of dependent parents' pension as prescribed by sections 4695 and 4707, Revised Statutes, is not only to violate all rules of construction of statutes, but would force us to the admission that it also repealed the provision of the act of March 19, 1886, which was, in effect, but an amendment of said section 4707, so far as it affected the rate of those dependent mothers entitled to less than \$12 per month.

If, then, section 4707, and its amendment of March 19, 1886, are

repealed by implication by the proviso of section 2 of the act of June 27, 1890, where is there left any rate for a dependent mother?

Mandamus would unquestionably lie against a commissioner, or Secretary of the Interior, who refused to recognize rank rate, as the determination of that question alone is fixed by the law, and no discretion is left to the administrative officer when the undisputed facts establish the right to pension, the only remaining duty being the insertion of the legal rate. In such a case the duty of naming the rate is ministerial, not discretionary or judicial, and a refusal to perform a plain ministerial duty could undoubtedly be enforced by the courts. The law names the rate.

If it be said that a mother should not receive a rank rate, because a soldier's widow under the act of June 27, 1890, is entitled to but \$8 per month, and that rank rate is not recognized in widows' claims under said act of June 27, 1890, it should be borne in mind that the widow is not required to prove that her husband's death was due to the service in order to secure a pension under that act; while the dependent mother, under section 4707, as amended by the first section of the act of June 27, 1890, is required to prove that her son's death was the result of his service before she can obtain a pension as a dependent mother.

If the widow can establish the fact that her husband's death was due to the service, she, like the dependent mother, is entitled to a rank rate, in all respects the same as the mother.

The phraseology of your inquiry would indicate that you are of the opinion that a dependent parent could file a claim subsequent to the act of June 27, 1890, under section 4707, as it existed prior to that date. Such I do not conceive to be the case, as, by the very terms of the amendment of June 27, 1890, to section 4707, the pension can only commence from the date of filing the application; and so, under the provisions of section 2 of the act of March 3, 1879, their pensions, unless filed prior to July 1, 1880, must commence from date of filing the application.

There would, therefore, be no period of time for which a dependent parent (not insane) could draw a pension prior to filing an application.

Dependence at date of death of son, or past dependence (except as to insane parents), becomes immaterial in all dependent cases filed since June 27, 1890, except as such fact may have a bearing upon present dependence. In other words, if present dependence is shown (dependence at date of filing the application subsequent to June 27, 1890), past dependence or dependence on the son at the date of his death (unless his death occurred on the same day that the application was filed) becomes immaterial and should never be required. Applications should be filed under the law as it exists at the date of filing, not as it existed prior thereto, where the claim, if allowed, is required to commence from the date of filing the application.

To state the case in another form: All applications of dependent parents filed since June 27, 1890 (except in case of insane parents), are filed under section 4707, as amended, and there is no authority for filing a dependent parent's claim subsequent to June 27, 1890, under section 4707, as it existed prior to the amendment of that date, except in the case of insane parents.

As stated in said departmental decision of June 21, 1899, section 1 of the act of June 27, 1890, should be read and construed in *pari materia* with section 4707, as amended by other acts, the same as if the **wo**, with other amendments of said section, comprised but one section bearing date of June 27, 1890, when applied to dependent parents' claims filed subsequent to that date, thus eliminating from section 4707 such portion as is repugnant to the last act. The portion thus eliminated would be that portion of section 4707 as required proof of dependence on the soldier at the date of his death and subsequent thereto and up to the time of filing application.

Immaterial testimony alone can never be the basis of a pension claim, and, as proof of dependence prior to filing a dependent parent's claim subsequent to June 27, 1890, is immaterial, irrelevant, and mere surplusage, there remains no basis for a dependent parent's claim under section 4707, as it existed prior to June 27, 1890, and no authority for filing a claim under the unamended section subsequent to June 27, 1890, or for permitting claimants to encumber the record with useless testimony which, when filed, avails them nothing. So, too, it is unjust and misleading to claimants to impose upon them the unnecessary expense of procuring and filing testimony which the law does not require and which in no manner tends to establish their right to pension where it falls short of proof of present dependence.

Claimants should be advised that all dependent parents' claims should be filed under section 4707, as amended by the act of June 27, 1890 (except in the case of insane parents), and that their proofs will be required to conform to this law.

Paragraph 3, page 116, Treatise on the Practice of the Pension Bureau, is hereby amended so as to read as follows:

Pensions for dependent parents are rated in accordance with the provisions of section 4707, as amended by the act of March 19, 1886.

The case of Mary Aun Hurst (9 P. D., 406), to which you call my attention, is hereby overruled, and any other decision in conflict with the case of Elizabeth Darling, mother of Franklin Rickard (10 P. D., 244), decided June 21, 1899, will not be regarded as authority in future.

The papers in the case accompanying your communication are herewith returned.

MARRIAGE AND DIVORCE—EVIDENCE.

REBECCA WILEY (WIDOW).

First. Under the Maryland decisions, the same proof of cohabitation, general reputation, and acknowledgment, that will establish a marriage good at common law, will establish the presumption of a religious ceremonial marriage in that State. *Richardson v. Smith* (80 Md., 89); *Redgrave v. Redgrave* (38 Md., 97); *Jackson v. Jackson* (80 Md., 176); *S. C.* (82 Md., 17); *Barnum v. Barnum* (42 Md., 251); and *Jones v. Jones* (48 Md., 391).

Second. The evidence in this case fairly establishes a valid marriage of the claimant and soldier under the laws of Maryland, even assuming the decision of the supreme court of that State in the case of *Denison v. Denison* (35 Md., 361) to be a correct construction of the Maryland statutes.

Assistant Secretary Webster Davis to the Commissioner of Pensions, September 22, 1899.

Rebecca, widow of William Wiley, late private, Company E, Eleventh Maryland Infantry, by her attorney, appealed May 13, 1899, from the Bureau action rejecting her old law widow's claim, filed October 18, 1892, on the ground of her inability, though aided by special examination, to prove that she is the legal widow of the soldier, and that the evidence filed since the rejection of her claim, October 28, 1898, is not sufficient to warrant reopening of claim.

It is contended, in brief, that the evidence proves a valid ceremonial marriage under the laws of Maryland and the decisions of the courts in that State, citing the decisions in the cases of *Sellmon v. Bowen* (8 Gill and Johnson, 50); *Boone v. Purnell* (28 Md., 607); *Copes and Adams v. Pearse* (7 Gill, 263); *Redgrave v. Redgrave* (38 Md., 93); *Barnum v. Barnum* (42 Md., 251), and *Farnhill v. Murray* (1 Bland, 479); that under the laws of Maryland (1 Md., Code, General Laws, art. 35, sec. 2) the wife is prohibited from testifying to her marriage, as was held in *Redgrave v. Redgrave* above cited, and that marriage is permitted to be proved by general reputation, cohabitation, and acknowledgment.

Soldier enlisted May 23, 1864, and was honorably discharged with his company September 28, 1864. He died December 17, 1866, without having filed a claim for pension, and the evidence tends to show that the cause of his death was consumption. Both soldier and claimant had been previously married. Claimant's first husband died May 15, 1856, and soldier's first wife died prior to his alleged marriage to claimant.

Claimant alleged in her application that she was married to soldier in Baltimore, Md., March 10, 1857.

The only question to be considered in this appeal is whether the evidence establishes the fact that claimant was married to soldier.

Rev. John W. Hedges, aged 79, testified, in an affidavit August 19, 1897, that he was the—

pastor of Jefferson Street M. E. Church, Baltimore, Md., in the year 1857, and united in the bonds of holy wedlock William Wiley and Mrs. Rebecca Sprowl, about the month of March, at the beginning of my pastorate of said church; memorandas nor memory will not serve me any more minutely as to exact date of month.

Before the special examiner he testified, April 25, 1898, that he was pastor of said church in 1857 and 1858; that he married Rebecca Sprowl to William Wiley at the parsonage, one door south of the Jefferson Street M. E. Church, Baltimore, Md., as stated in his affidavit; that he could not tell whether he made a return of the license or not; that he would not have married them without the license; that he does not remember any persons who were present except Mrs. Hedges, who is dead; that he had no record of this marriage; that he certainly had some information on the subject when he made his affidavit; that he could not safely say whether he did or did not get a letter from the claimant or her agent refreshing his memory at the time he made that affidavit; that he had no present recollection that he did perform that marriage ceremony; that it was his uniform practice to make a return of all licenses; that he was the pastor of said church in March, 1857, that being the beginning of his pastorate of that church.

Joseph A. Kraft, aged 64 years, testified, in an affidavit July 30, 1897, that he was well acquainted with William Wiley from the latter part of 1855 to the time of his death; that Wiley came to Baltimore about that time, and they were both employed by an omnibus company as drivers, and remained with the company several years and became fast friends; that he remembers clearly when Wiley was married to Mrs. Rebecca Sprowl about the fore part of March, 1859, and that he saw them married; that Wiley told him they were going to be married and asked him to drive the carriage from the house near Baltimore Cemetery, where Mrs. Sprowl lived and where Wiley boarded, to the minister's house, and while they were in there he remained to watch the horses and looked through the window and saw them standing and the minister reading from a book; that they joined hands and were married; that he remembers joking with them on the way back; that years have passed, and he never charged his memory with the occurrence and could not then remember the name of the minister or the street it was on, but it was near Jefferson or Bond street, and that he thought the minister was from Jefferson Street Church.

The special examiners reported that this witness's reputation for veracity and credibility was good.

Rev. Howard F. Downs, pastor of said Jefferson Street M. E. Church, testified before the special examiner March 10, 1898, as follows:

I have made a close examination of the records of said church relating to marriages and do not find any record of the marriage of William Wiley and Rebecca Sprowl, having examined the several records from 1854 to 1858. Elisha D. Owen was the first pastor of this church, and the second was John W. Hedges. In looking over the records during the pastorate of John W. Hedges I find there are some probable omissions in recording marriages, as blank spaces are left in the record in two different places, as if it was the intention to record therein a marriage, and in one instance in the record of 1857 is recorded a marriage which took place in 1856, and marked "omitted," showing delay or probable carelessness in keeping the record.

The testimony further shows that from the date of said alleged ceremonial marriage to the date of soldier's death, with the excep-

tion of the time soldier was absent from his home while in the service, they lived and cohabited in Baltimore, Md., as husband and wife and were so regarded by their friends, relatives, acquaintances, and neighbors; that claimant with others executed a deed in 1872 as "Rebecca Wiley, formerly widow of James Sprole;" that she participated in the distribution of the estate of her brother, William Powell, deceased, as Rebecca Wiley in 1867; that William George Wiley was baptized by the rector of St. Luke's Church, Baltimore, Md., March 2, 1862, as the child of William and Rebecca Wiley, born January 18, 1860; that Henry, born January 1, 1866, Mary E., born May 26, 1857, and Ida V. (called Jennie), born October 12, 1863, were baptized by the pastor of the Union M. E. Church, West Lombard street, Baltimore, as the children of William and Rebecca Wiley; that all of these children were recognized by soldier and claimant and their relatives and acquaintances as the children of said soldier and claimant, and that there had never been a suspicion or intimation questioning the legitimacy of said children, or the marriage of their parents, by their friends, relatives, acquaintances, or neighbors; that claimant's first husband, James Sprole, died May 15, 1856, as the result of an accident, and was buried in lot 49, Section R, in Baltimore Cemetery; that Harry Wiley, who died of brain fever at the age of 4 months, was buried in the same lot 49, May 8, 1866; that William Wiley, the soldier, died of consumption at the age of 46, and was buried in said lot 49, December 19, 1866, and that William Wiley, aged 37, the son of claimant, died of apoplexy, and was buried in said lot 49, February 8, 1897.

An adverse presumption appears to have been raised by the special examiner who examined claimant January 15, 1897, based on the facts that there were no official records showing the alleged marriage or the issuance of a license, and that claimant gave the name of "Owens" as the officiating clergyman and the place of marriage as St. John's Church, Baltimore, Md.

In view of the fact that there is no evidence that any record of the issuance of a license was kept by the city of Baltimore at that time, probably the officials relying upon the return of the certificate of the officiating clergyman as evidence of the issuance of the licenses and the performance of the marriage ceremony, and in view of the further fact that claimant's memory was admittedly very poor and her age 77 years, and that Rev. Mr. E. D. Owens was the name of the clergyman who immediately preceded Rev. Mr. Hedges, I do not regard these facts as very important. Claimant testified that it seemed to her his name was something like "Owens," but she could not state whether that was his name or not, but thought he must have been a Methodist minister; that she was lawfully married to William Wiley by a minister under regular ceremony, but she can not remember his name; that her husband, Mr. Wiley, made all the arrangements for the marriage, but she was unable to recall whether she was married in the church or in the parsonage. This special examiner reported claimant as an honest appearing woman; that she had a good reputation.

The first special examiner who examined claimant, August 11, 1896, reported her reputation good and recommended admission of the claim.

In the Bureau action of April 27, 1899, a reference is made on the face of the brief to the action of the law division, a reference to which shows that the chief of the division on October 24, 1898, reported as follows:

After a careful examination of the cases cited by Attorney Staley, of Baltimore, Md., I am of the opinion that, notwithstanding that they show that the courts of Maryland have held that proof as to general reputation is admissible to show marriage, the courts unquestionably intended to restrict such evidence to proof of marriage itself, and that such proof must be to the effect that the marriage was duly and legally contracted according to the law of the place or country in which it occurred. Therefore, inasmuch as the marriages in the case cited were contracted and consummated in other States and not under the laws of Maryland, it is apparent that while this claimant was in a position to contract a lawful marriage with the soldier in 1857, it is not shown that such a celebration of marriage took place as could be considered lawful and legal under the laws of the State of Maryland. Hence I must conclude that these citations are not applicable to her case.

The Maryland statutes of 1777, section 3, provides that—

The rites of marriage between any white persons, subjects, or inhabitants of this State shall not be celebrated by any person within this State unless by ministers, * * * and if any person shall celebrate the rites of marriage between any white persons, as aforesaid, contrary to the true intent and meaning hereof, he shall forfeit and pay for every offence five hundred pounds, current money.

Section 5 of said act provides that—

No person within this State shall marry without a license * * * under a penalty of five hundred pounds, * * * and if any minister shall marry any person without such license or publication, as aforesaid, he shall also forfeit five hundred pounds. (See 1 Kilty, 445, 446.)

It was held under this statute in the case of *Denison v. Denison* (35 Md., 361) that some religious ceremony is necessary to perfect a marriage in that State, and that no lawful marriage can be contracted merely per verba de presenti or per verba de futuro cum copula.

There is no provision in the statutes of Maryland which contains any positive declaration that marriages not celebrated in the manner prescribed by the statute shall be void. In construing the Maryland statute, which by act of Congress approved February 27, 1801 (2 Stat. L., 103), were continued in force in that part of the District of Columbia ceded by Maryland to the United States, as applied to marriages in said District, it was held in the case of *Annie Higgins* (10 P. D., 110) that a marriage per verba de presenti was valid at common law, and is valid in the District of Columbia, citing *Thomas v. Holtzman* (18 D. C., 62); *Meister v. Moore* (96 U. S., 76).

In the case of *Maria McCarthy* (10 P. D., 118), involving the same question of construction of the Maryland statutes on marriage, it was held that said statute was directory, and as it contained no express clause of nullity, a marriage valid at common law was valid under said statute in the District of Columbia, citing 2 Greenleaf on Evidence,

paragraph 460; *Meister v. Moore* (96 U. S., 76); *Parton v. Henry* (1 Gray, Mass., 119); Bishop on Marriage and Divorce, section 283 et seq.; Reeves on Domestic Relations (99, 200); 2 Kent Com. (90, 91); *Hutchins v. Kimmel* (31 Mich., 126), and *Proctor v. Bigelow* (38 Mich., 282).

Even in Maryland and under the *Denison* decision (35 Md., 36) the fact of a ceremony is not required to be strictly proved, evidence of general reputation merely from which marriage may be inferred being sufficient, except in cases of adultery or bigamy, in which only strict proof is required, as was held in the *Higgins Case* (10 P. D., 110), citing *Jackson v. Jackson* (80 Md., 176; 82 Md., 17); *Boone v. Purnell* (28 Md., 607); *Redgrave v. Redgrave* (38 Md., 97); *Jones v. Jones* (45 Md., 159 and 48 Md., 391).

The court of appeals of Maryland in the recent case of *Richardson v. Smith* (80 Md., 189) decided November 22, 1894, that—

In this State there can not be a valid marriage without a religious ceremony; but a marriage may be competently proved without the testimony of witnesses who were present at the ceremony. It would work a cruel injustice in many instances if the law were otherwise. The witnesses might be dead, and competent written evidence of the ceremony might be unattainable. It would not follow, however, that the union between the parties would be considered illicit and the children illegitimate. The law has wisely provided that marriage may be proved by general reputation, cohabitation, and acknowledgment. When these exist, it will be inferred that a religious ceremony has taken place, and this proof will not be invalidated because evidence can not be obtained of the time, place, and manner of the celebration of the marriage. On this point we think it unnecessary to do more than quote from *Rodgrave v. Rodgrave* (38 Md., 97): "Where parties live together ostensibly as man and wife, demeaning themselves toward each other as such and are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married. Taylor's Ev., sec. 140, 517, *Hervey v. Hervey* (2 W. Bl., 877); *Goodman v. Goodman* (28 L. J., ch. 1); *Jewell v. Jewel* (1 Howard, U. S., 219, 232). Indeed, the most usual way of proving marriage, except in actions for bigamy, is by general reputation, cohabitation, and acknowledgment. *Sellman v. Bowen* (8 Gill v. John., 50); *Boone v. Purnell* (28 Md., 607)."

In the case of *Jackson v. Jackson* (80 Md., 176) the said Maryland court held that marriage may be proven in the State of Maryland by general reputation, cohabitation, and acknowledgment in all cases, except actions for criminal conversation and prosecution for bigamy; that by the law of Maryland a valid marriage can not exist unless it is celebrated by a religious ceremony; that it was not required that the marriage should be proved by witnesses who were present at the time, but such facts must be proved as in the contemplation of the law will justify the inference that a religious ceremony has been performed, and that the declarations of deceased parents are admitted as evidence to prove the legitimacy of their children, citing *Crawford v. Blackman* (17 Md., 49); *Boone v. Purnell* (28 Md., 607); *Copes v. Pearce* (7 Gill, 247); *Redgrave v. Redgrave* (38 Md., 97); and Taylor on Evidence, section 517.

While the *Jackson Case* (8 Md., 176) involved the validity of a Penn-

sylvania marriage, yet the Maryland court held that it could not take judicial notice of the laws of another State, and in absence of evidence as to that law no instruction concerning the same should have been granted. The result of this holding was therefore the same in that case as if the marriage had been alleged to have taken place in Maryland.

The Jackson Case was again before said court November 15, 1895 (82 Md., 17), when the previous holdings of the court were reaffirmed, and the court referred to the two exceptions to the general rule that a marriage valid where consummated is valid everywhere, viz: First, marriages which are deemed contrary to the law of nature as generally recognized in Christian countries, which involve polygamy and incest; second, marriages which the local law-making power has declared shall not be allowed any validity.

In *Barnum v. Barnum* (42 Md., 251), the court after referring to the maxim that "the law always presumes in favor of legitimacy," and that where the proof shows the existence of continued cohabitation of the parties for several years, as man and wife, the presumption is always indulged that the cohabitation is legal rather than otherwise; that if parties live together ostensibly as man and wife, demeaning themselves toward each other as such, and especially if they are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married; citing *Redgrave v. Redgrave* (38 Md., 97) and *Cunningham v. Cunningham* (2 Dow, 482), proceeded as follows:

But unfortunately the facts to which we have referred are confronted with such an array of countervailing evidence that to maintain the existence of the marriage is rendered utterly impossible. It is perfectly clear, and not contended to be otherwise, that an illicit connection between the parties commenced and continued for some time in North Carolina before they removed to Arkansas. It was while this illicit connection existed that Dr. Barnum left North Carolina, taking Caroline Butler with him, she then being pregnant with child. They left North Carolina in 1837, and their illicit connection and cohabitation continued without intermission after their arrival in Arkansas. This being so it is incumbent upon those who set up a subsequent marriage between the parties to show when and where it occurred. It is affirmed and attempted to be shown that the parties were subsequently married in 1838 or 1839 at the village of Manchester Bluff, Clark County, Ark., and that the marriage celebration took place before and in the office of one Edmonson or Edminson, a justice of the peace. Having thus fixed upon the time and place and assumed to prove that a valid marriage was then and there celebrated and at no other place, if the evidence should be insufficient to establish such a marriage, thus assumed to be proved, the parties can not be permitted to rely upon other facts and circumstances as the ground of presumption that a marriage may have taken place between the parties at some other and different time and place from that testified to by the witnesses, the presumption in such a case being that the connection between the parties continued to be illicit until that presumption is overcome by distinct proof of marriage. *Blackburn v. Crawford* (3 Wall., 175).

Marriage may doubtless be proved in civil cases other than actions for seduction—by reputation, declarations, and conduct of the parties but—where reputation is

relied on, that reputation, to raise the presumption of marriage, must be founded on general and not divided or singular opinion, and where reputation in such a case is divided it amounts to no evidence at all.

In *Jones v. Jones* (45 Md., 144) it was held that—

Intercourse proved to have been illicit in commencement will be presumed to continue so, and evidence other than cohabitation will be necessary to establish a marriage, but any facts or circumstances tending to show a change from the unlawful to the lawful relation of the parties may go to the jury as evidence upon which to found a presumption of marriage, though not amounting to direct proof.

In the same case (48 Md., 391) the court held, March 26, 1878, that—

The general doctrine is that if parties live together as man and wife, demeaning themselves toward each other as such, and especially if they are received into society and treated by their friends and relations as having been entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married. But in such cases a legal marriage is only presumed from general repute and habit, and that presumption has its limit and may be overcome in particular cases by counter evidence or counter presumption.

From the foregoing decisions of the court of appeals of Maryland it appears that the same proof which will establish a marriage valid at common law, without a religious ceremony, in States where the validity of such marriages is conceded, will establish the presumption of a religious ceremonial marriage in the State of Maryland.

The holding of the court in the *Barnum Case* (42 Md., 251) that, a certain time and place having been alleged, it must be proved, and that the evidence of general reputation, cohabitation, and acknowledgment is not sufficient to establish presumption of marriage at some other time and place, is another form of stating the general rule applicable to pleadings and proof, viz: that a material variance between the proof and pleading is fatal. (See *Variance*, 28 Am. and Eng. Ency. of Law, 49.)

While, therefore, claimant alleged in her declaration that she was married by "Rev. Owens, at Baltimore," and in her testimony stated that she thought his name was Owens and the church or parsonage where she was married was St. John's, whereas the evidence offered is to the effect that the clergyman's name was Hedges and the parsonage where the service was performed was that of the Jefferson street M. E. Church, Baltimore, Md., I do not think the strict rules of common-law pleadings should be applied, and her claim rejected because of variance between her allegation and proof, and which variance can in the courts generally be cured by an amendment of the pleadings so as to conform to the proofs.

As I stated in instructions (9 P. D., 93),

After a careful examination of the various enactments of law that go to make up the pension system, I can not think it was the intention of Congress to hedge their administration with the difficulties and pitfalls of any system of special pleading, technicalities and refinements of which may tend to a practical defeat of the intent aid intended to be extended to the soldiers of the Republic. The pension law is essentially a law sui generis; and while a proceeding had there-

under, when not expressly regulated by statute, may draw to itself the aid of certain canons of law and rules of evidence, yet the very nature of cases arising under this law forbids that strictness and technicality that attend upon regular court proceedings.

Here, the will of the legislature being ascertained, the attendant proceedings should be as simple as possible. A multitude of rules tends to confusion; and the way of the claimant should not be hedged about with any difficulty that can be avoided.

The adverse facts in this case are, that at the time of said alleged ceremonial marriage claimant was pregnant with child by said soldier and that she delayed her application for pension for nearly twenty-six years after the death of soldier, although her delay may be accounted for from her reluctance to make public the fact that she cohabited with soldier prior to marriage, until forced by age and poverty to make the application. Her pastor and her physician both testify in 1897 to her extreme poverty and that her case is one that appeals strongly for and deserves special attention.

I am of the opinion that, first, under the Maryland decisions, the same proof of cohabitation, general reputation, and acknowledgment that will establish a marriage good at common law will establish the presumption of a religious ceremonial marriage in that State. *Richardson v. Smith* (80 Md., 89); *Redgrave v. Redgrave* (38 Md., 97); *Jackson v. Jackson* (80 Md., 176); *S. C.* (82 Md., 17); *Barnum v. Barnum* (42 Md., 251), and *Jones v. Jones* (48 Md., 391); second, the evidence in this case fairly establishes a valid marriage of the claimant and soldier under the laws of Maryland, even assuming the decision of the supreme court of that State in the case of *Denison v. Denison* (35 Md., 361) to be a correct construction of the Maryland statutes, and the action rejecting her claim on the ground stated is accordingly reversed.

The question as to whether soldier's death in 1866 was due to his military service, from which he was discharged in 1864, is not involved in this appeal and is not passed upon.

The papers in the case are herewith returned.

MARRIAGE AND DIVORCE—EVIDENCE.

ANNA MARIA GALLICH.

A divorce is never presumed, except it be for the purpose of upholding a subsequent marriage, such marriage having been proved to be an established fact.

The mere fact that one lived with another man or woman in a marital state, or that there was a subsequent ceremonial marriage, is not sufficient to warrant a presumption of divorce. There must be other substantial facts in connection therewith before such a presumption can be successfully invoked.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
September 22, 1899.*

Anna Maria, as widow of Francis Gallich, formerly a private in the United States Marine Corps, in the Mexican war, filed her application

under the act of January 29, 1887, on November 9, 1895, claim being rejected on the ground that claimant was not the widow of the sailor in question. An appeal filed on March 24, 1898, contends that rejection is contrary to law and fact.

The facts in this case are as follows: The claimant herein was married to the sailor by ceremony by Rev. Otto Borgess, pastor of Holy Trinity Church, Philadelphia, Pa., on November 24, 1844. This fact is proved by a certified copy of the church record on file herein. Sailor enlisted in the United States Marine Corps on November 19, 1845, served in and through the Mexican war, and was discharged on the Pacific station on November 18, 1849. He did not return to his home, but was in correspondence with his wife as late as 1853, his letters being in evidence, and being couched in affectionate terms, as well as showing the existence of the marriage tie. He was on said last-mentioned date in the gold diggings in California.

The claimant states that she received no more tidings from him until she filed a claim as his widow, when she was informed that her husband was alive, and living in the Republic of Guatemala, he having filed a claim as a Mexican war survivor, which claim appears to have been approved for admission on April 10, 1888.

The consul-general for Guatemala, being cognizant of the fact that sailor was a pensioner, notified the Commissioner of Pensions that said sailor died in said Republic on March 14, 1895, as will be seen hereafter. There is also on file in this case affidavits from claimant and her immediate relatives to the effect that claimant was never divorced from sailor, and an affidavit from the prothonotary of the court of common pleas, Philadelphia, Pa., to the effect that the records of his court fail to show any such divorce. Claimant appears to have spent all her life since her marriage in and about Philadelphia.

As the correspondence of the consul-general has an important bearing upon the issue herein, the following copy of letters and documents are set forth:

EXHIBIT 1.

U. S. GENERAL CONSULATE,
Guatemala, September 26, 1895.

JOHN TURBOT, Esq.,
2025 Hancock St., Philadelphia, Pa.

SIR: I beg leave to acknowledge your letter of Sept. 7, in which you ask for information relative to Frank Galich. Mr. Galich died several months ago in this city. Knowing that he was pensioned, I at once notified the Commissioner of Pensions. A few days after his death a woman presented herself at this office, claiming to be his wife, and made inquiry after his pension. I referred her to the Commissioner of Pensions in Washington.

If I can give any assistance to you in this matter, please call on me.

I am, sir, yours, truly,

D. LYNCH PRINGLE,
Consul-General.

EXHIBIT 2.

O. W. and N. Div.
J. G. J.
Mex. Wid. 9518.
Anna Maria Gallich,
wid. of Francis Gallich.

DEPARTMENT OF THE INTERIOR,
BUREAU OF PENSIONS, *Washington, D. C., June 17, 1896.*

SIR. I have the honor to advise you that Anna Maria Gallich, of Philadelphia, Pennsylvania, is an applicant for pension as the widow of Francis Gallech, deceased, who was a pensioner under certificate No. 14761, for service rendered in the Mexican war.

The widow files a certificate of her marriage to the soldier on the 24th of November, 1844, at Philadelphia, Pennsylvania, and, from his letters on file with the claim, the soldier seems to have recognized the marriage relation as late as the year 1853, when he deserted his wife, and some time prior to 1887, when he applied for pension, became a resident of Guatemala.

In your letter to John Turbott, esq., of Philadelphia, Pa., dated September 26, 1895, on file with the claim, you announce the death of the soldier, and state that a few days after his death "a woman presented herself at your office, claiming to be his wife, and made inquiry as to his pension."

On the 9th of December, 1893, the then U. S. consul-general at Guatemala furnished the soldier a certified copy from the Miscellaneous Record Book of the consulate, to wit: "Francis Gallich, a naturalized citizen of the United States, and who served four years in the U. S. Marine Corps during the Mexican war, from 1845 till the fall of 1849, now a resident of Guatemala, *unmarried*, having been vouched for to me as aforesaid, I hereby register him as an American citizen, and record the following description of his person:"

(Signed)

JAMES R. HOSMER,
U. S. Consul-General.

Following the personal description, the record continues: "Francisca Gallich, born October 11, 1880; Luis Gallich, born October 9, 1884; children of Francis Gallich, above described."

There is, also, on file with the claim, a certificate from the chief of the civil registry, Guatemala, to wit: "That in the book of deaths, No. 25, there is an entry, No. 844, which reads: 'In Guatemala, the 14th of March, 1895, appeared Don Nazario Rivera, and he declared that in house of the old parish, yesterday, at six o'clock, died, without leaving a will, of dysentery, Francisco Gallich, 61 years old, married with Francisca Gallich, 61 years old, married with Francisca N., Catholic by religion, merchant, captain, of German origin, and resided in this city,'" etc.

The prothonotary of the courts of common pleas of Philadelphia, Pa., certifies that there is no "record of divorce proceedings between Anna Maria Gallich and Francis Gallich from 1845 to date," and parties in Philadelphia who knew them as man and wife prior to his desertion, and have known the wife intimately ever since, swear that they lived peaceably while together, and that they have no knowledge of, and never heard of, any proceedings in divorce.

In view of the facts above related, I respectfully request that you will ascertain, from proper sources, and advise this Bureau of the true relation existing between Francis Gallich and Francisca N., as above set forth; and particularly whether there is any record of their marriage, and any proceedings of record, in Guatemala, by which the marriage, if any, was or may be considered as legalized.

Very respectfully,

Commissioner.

The Honorable D. LYNCH PRINGLE,
U. S. Consul-General, Guatemala.

EXHIBIT 3.

U. S. CONSULATE-GENERAL,
Guatemala, Aug. 11, 1896.

To the COMMISSIONER OF PENSIONS,

Department of the Interior, Bureau of Pensions, Washington, D. C.

SIR: With reference to your letter of June 17th, which refers to the claim of Anna Marie Gallich, widow of Francis Gallich, who died in this city some time back.

Although it is a notorious fact, Francis Gallich was married twice here, still there exists no legal proof or record of either marriage.

The only record of having been married is that which is shown in the record of death, copy of which is on file in Philadelphia. I enclose copy.

The civil register only goes back as far as 1877. It might be possible to procure proof of these marriages through the presence and knowledge of individuals by affidavit. His first wife was the daughter of the celebrated President Carera.

I do not know who his second wife was, but it could be ascertained. All these points, however, would cause some trouble and expense, and I think the claimants should expect to pay a lawyer to obtain them, if required.

I am, yours truly,

D. LYNCH PRINGLE, *Consul-General.*

P. S.—Since writing the above the said Francisca N., the woman who claims to have been married to Mr. Gallich about 17 years ago, has been in to see me and informs me that she was totally ignorant of the fact that he had an American wife. She was married in a village in this Republic and says she will produce the proof of the marriage, which will be forwarded.

EXHIBIT 4.

UNITED STATES CONSULATE-GENERAL,
Guatemala, July 10th, 1897.

JOHN TURBOTT, Esq.,
2025 N. Hancock St., Phil.

SIR: I beg leave to acknowledge receipt of your letter of June 25, which refers to the claim of the widow of Francis or Frantz Gallich.

This whole matter has been investigated and reported upon by me twice, and I think that you can get the information you desire by applying to the Commissioner of Pensions, to whom I sent the certificate of death.

There is absolutely no record of there having been any divorce obtained by Gallich from his wife. In fact no divorce existed according to the laws of this Republic until quite a short time ago.

Gallich regularly married the first time the daughter of the celebrated Pres. Carera. She died and he married the woman with whom he was living at the time of his death.

She tells me that she has all her papers regularly registered, and said that she intended to bring them here to-morrow to prove that she was regularly married, but she has failed to do so up to the present time.

It would seem to me that Anna Marie Gallich is lawfully and legally entitled to the pension; this is, however, only a matter of opinion.

I am yours, truly,

D. LYNCH PRINGLE, *Consul-General.*

There is a seal which reads:

REPUBLIC OF GUATEMALA,
25c.
1895.

No. 381284.

The chief of the civil registry.

CERTIFIES

That in the book of deaths, No. 25, there is an entry—No. 844—which reads: "In Guatemala, the 14th of March of 1895, appeared Don Nazario Rivera, and he declared

that in a house of the old parish yesterday at six o'clock died, without leaving a will, of dysentery, Francisco Gallich, 61 years old, married with Francisca N., Catholic by religion, merchant, captain, of German origin, and resided in this city, being the son of a person of the same name as himself and of Catherine N." He ratified what has been said after it was read to him, and he did sign it.

Attested by J. Cupertine Aragon, Lazaro Valdez, chief of the civil registry, Manuel Rojas M.

At the request of interested parties I write the present in Guatemala this 19th day of November, 1895.

There is a rubber stamp which reads:
Civil registry, Guatemala. Duties, 753c.

MANUEL ROJAS M.

The undersigned, Spanish consul in the city of Philadelphia, certifies that the above is a true translation from the Spanish that has been exhibited to him for such purpose, and for which no duties have been charged.

Philadelphia, Dec. 9th, 1895.

[SEAL.]

JOSÉ CONGOSTO,
Consul for Spain.

EXHIBIT 5.

CONSULATE-GENERAL OF THE UNITED STATES,
GUATEMALA, CENTRAL AMERICA.

Guatemala City, September 12, 1887.

Francis Galich, a naturalized citizen of the United States, and who served four years in the U. S. Marine Corps during the Mexican war, from 1845 till the fall of 1849, now a resident of Guatemala, unmarried, having been vouched for to me as aforesaid, I hereby register him as an American citizen, and record the following description of his person:

(Signed)

JAMES R. HOSMER,
U. S. Consul-General.

Age, 63 years; stature, 6 ft. 2 in.; forehead, high; eyes, brown; nose, large; mouth, moustache; chin, broad; hair, gray; complexion, fair.

Signature:

(Signed)

FRANCIS GALICH.

Francisca Galich, born October 11, 1880, Luis Galich, born October 9, 1884, children of Francis Galich above described.

(Signed)

JAMES R. HOSMER,
U. S. Consul-General.

CONSULATE-GENERAL OF THE UNITED STATES,
at Guatemala.

I hereby certify that the above is a true copy of the record found on page 78 of the sole miscellaneous record book of this consulate, and is given by me to Francis Galich this 9th day of December, A. D. 1893, to aid him in securing the repayment of his Mexican war pension.

[SEAL.]

HENRY C. STUART,
U. S. Consul-General.

Free.

c/o Consul-Gen., Guatemala.

EXHIBIT 6.

LEGATION OF THE UNITED STATES OF AMERICA
IN CENTRAL AMERICA.

Guatemala, Dec. 13, 1893.

From the papers which he has and from his own account of himself I am assured that the applicant, Francis Galich, is a citizen of the United States and is entitled to a pension.

[Seal of the legation.]

P. M. B. YOUNG,
U. S. Minister.

The specific ground of rejection is as follows:

Claimant widow of soldier, Francis Galich, private, United States Marine Corps.

Respectfully referred * * * with the opinion that claimant has not satisfactorily shown that she is the legal widow of the marine and that her claim should be rejected.

By reason of the long separation and absence of the husband of nearly or quite fifty years, and remarriage on his part, divorce must be presumed, and it falls upon claimant to show that there was no divorce, which she failed to do.

The issue in this case is simple, being wholly one of law, according to facts in evidence.

The marriage of claimant and sailor has been proved by not only the best evidence that the case is susceptible of, but by the very highest class of evidence. This marriage is a matter of record, and a transcript of said record is on file. Moreover, the letters hereinbefore referred to show conclusively that the sailor recognized this marriage relation; and, further, you admit this marriage as a legal one. Now, this marriage being an accepted fact, it is of continued binding and full force until another status is shown, and nothing but the death of one of the parties or a divorce granted by a court of competent jurisdiction can break the tie and render a subsequent marriage valid. Death did not intervene in this case, and the sole reason on which you hold this marriage sundered is found in the words previously quoted, viz:

By reason of the long separation and absence of the husband of nearly or quite fifty years, and remarriage on his part, divorce must be presumed.

Now, it may be stated as a sound legal proposition and without fear of successful refutation that never in the history of trials where marriage is the issue has it been held solely upon the showing that there has been a separation of fifty or of any number of years that a divorce will be presumed. The contention to the opposite effect is clearly unsound, and I have never before heard of such a proposition being urged.

I admit that under certain circumstances, one of such circumstances invariably being that one of the parties is shown to have actually remarried, a divorce is sometimes, although very rarely, presumed. But I have failed to find, after extended research, that a divorce will be ever presumed except it be for the purpose of upholding a subsequent marriage, such subsequent marriage being the direct and not the collateral issue. Now, it is first to be noted, as to this, that the question of a subsequent marriage of sailor is not the direct issue in this case. There is no contesting widow here. But suppose the validity of a subsequent marriage was the direct issue, and suppose also there was a contesting claimant, what would be the first thing to be established? Clearly it would be that a subsequent marriage had actually been accomplished. What is the proof thereof in this case? Nothing—absolutely nothing—but the statement in the book of death, as shown by the certificate of the chief of the city registry in Guatemala among other statements, that sailor was “married with Francisca N.”

This Francisca N. called upon the consul-general in August, 1896,¹ stating that she had been married to sailor for some seventeen years. This would make the date of her purported marriage somewhere in 1879, and yet eight years from that date, viz, on September 12, 1887, the consul-general registered this sailor as an unmarried American citizen, such registration being the outcome of statements by the sailor and by those who vouch for him. Although Francisca stated that she would substantiate her allegations as to being the wife of sailor she has wholly failed to do so. In fact, she has never endeavored to make any such proof.

It is pertinent to ask at this juncture that if this Francisca should file a claim as the widow of the soldier would you admit that she was the sailor's widow? Would you consider that she had established her right as widow under the evidence recited? I think not, and yet under your holding in this case you would be obliged to do so in order to be consistent, for you hold that claimant herein has no right, because of a remarriage on the sailor's part, and no one appears to claim any such rights outside of claimant save this same Francisca.

There is no proof or claim that sailor was ever married by ceremony to Francisca or to any other person save claimant, neither is there any evidence to the effect that a marital tie ever existed between sailor and any woman save claimant, except the statement of Francisca to the consul-general and the consul-general's statement that it was "notorious" that sailor had been twice married in Guatemala. In this connection it may be said that the word "marriage" has two distinct significations in common parlance. It means, first, that two parties of a different sex are living together in a matrimonial relation, while the other meaning is to the effect that they are so living by reason of a legal union. It is not to be supposed for a moment that because it was notorious that the sailor had been twice married in Guatemala that the consul-general intended to convey the impression that he had been twice married in a legal manner. It needs no further discussion to show that there is an absolute lack of proof or of even evidence that sailor ever had a legal wife other than claimant.

Sometimes, although rarely as heretofore stated, a divorce will be presumed. In such cases, however, the reason for such presumption is not that the rights of a former legitimate wife may be cut off, but that one who has shown herself as being a wife in fact may be held to be so in law, in order that marital rights may be decreed to the one whom the facts in evidence show clearly entitled to such rights. Neither this Francisca nor any other woman, save claimant, is entitled to any rights as the widow of sailor, and the evidence fails to show that anyone but claimant claims any such right.

Mr. Stewart, in his work on marriage and divorce, well states the proposition:

The presumption of innocence sometimes gives rise to a presumption of marriage. A man and woman cohabiting without being married are guilty of fornication; so

when such cohabitation is under color and claim of marriage, a marriage is often presumed, but such presumption is to save the innocence of the parties, and will not arise if it will involve or leave one of them in guilt, as if a man is cohabiting with two women, or if one of the parties is proved to be married to someone else. So sometimes if a second marriage is proved a previous divorce of the first one will be presumed; but in general a divorce can be proved only by the record. (Stewart on Mar. and Div., section 126.)

The States of Texas, Iowa, and Indiana are probably the only States of our Union in which the doctrine prevails to any extent that a divorce may be presumed in order to hold a second marriage good. The case of *Blanchard v. Lambert* (43 Iowa, 228) is the leading one in which such a doctrine is upheld, but the holding in that case is based upon a vastly different state of facts than are present in the one at bar. In said case one E. K. Lord married Horatio Muzgrave, and they separated in a year's time. Nine years thereafter she married I. D. Blanchard. Muzgrave was reported and supposed to have remarried, and he died in June, 1871; Blanchard died in August, 1873. The court held that a divorce between Muzgrave and his former wife, E. K. Lord, might be presumed, but added—

Under these circumstances, even if the marriage (between Blanchard and Mrs. Lord) were originally void, a subsequent marriage will be presumed to have occurred after the removal of all legal impediments by the death of Muzgrave.

thus basing their holding not upon the presumption of divorce alone, but also upon a common-law marriage springing into existence after the death of the first husband. There is no such sequence of facts in the present case, for the other party to the first marriage is still living, thus cutting off the possibility of a common-law marriage between the sailor and some other party.

It ought to be needless to say that in any case like the one under discussion the burden of proof rests upon the Government to show the validity of any purported marriage of sailor subsequent to the one he entered into with claimant. And in the present case it would be necessary for the Government to show that such subsequent marriage had been performed according to the laws of the Republic of Guatemala, and that such marriage was valid in the Republic of Guatemala, notwithstanding the fact that he had been previously married. Even upon proof as above, I very much doubt if any court in the United States would hold such a Central American marriage good without an actual divorce from the previous marriage.

This Department will not go to the length of cutting off the pensionable marital right of claimant in order to pave the way for the possible establishment of a right for one in a foreign country who has never made claim for any such right and who the evidence clearly shows lived with the sailor, if she did as a fact live with him at all in a meretricious way.

Presumptions regarding marriages are, in many cases, difficult and dangerous things to deal with. All presumptions, even those of law, are founded upon facts, and it needs no extended argument to show

that before a presumption can obtain in a given case there must be a sufficient amount of facts in evidence to warrant the invoking of the presumption. Just what facts are necessary, when marriage is the issue, before certain presumptions can obtain, have seldom been accurately laid down by any of our courts. Under the act of August 7, 1882, it is only safe to follow, if there have been adjudicated cases, the rulings of the appellate courts in the States under which the cause arises. (Fredricka Kent, 10 P. D., 211.) There can be no question as to the law upon this issue in Pennsylvania, the State in which this cause arose. If this case were before the courts in said State it would unquestionably be held that claimant was the widow of the sailor in question. (See Sarah C. Hayden, 8 P. D., 364.)

I hold, then, in this case: Claimant was legally married to the sailor. No other marriage of sailor has been shown, and no facts have been brought out whereby it could be presumed that sailor ever married again. Claimant has satisfactorily proved in a sufficient degree necessitated by the facts that there was no divorce between herself and the sailor, and there is no reason shown whereby it is necessary to presume for a moment that any divorce was needful.

In view of the peculiar grounds of rejection herein, I also hold: No divorce will be presumed in pension cases unless it be shown beyond question that the soldier or sailor through whom a pension is claimed actually contracted a subsequent marriage, the proof of such subsequent marriage being as strong as that regarding the first marriage; and then only when all the facts in the case warrant the conclusion that a divorce was actually obtained. The mere fact that one lived with any other man or woman in the marital relation, or the mere fact that there was a ceremonial subsequent marriage, is not sufficient to warrant the presumption of a divorce. There must be other substantial facts on which to base such presumption.

The rejection of this claim for cause stated was clearly erroneous. Claimant is the widow of Francis Gallich.

The action appealed from is reversed.

EVIDENCE—RECORD—CERTIFICATE OF DISABILITY.

DANIEL M. DELO.

A record made at the time of the soldier's discharge, by the surgeon who recommended his discharge, showing that the disability was incurred about the time he alleges and "whilst in the performance of his duty" is accepted as sufficient evidence of incurrence in line of duty, there being nothing in the case, after a special examination, tending to discredit such record, and no other evidence being obtainable.

Assistant Secretary Webster Davis to the Commissioner of Pensions, September 22, 1899.

The appellant, Daniel M. Delo, filed his original application for invalid pension on January 5, 1894, alleging that while in the military service

of the United States and in the line of duty, about September 1, 1862, he contracted fever, which resulted in rheumatism, affecting the left leg, knee, and hip. He subsequently alleged that about September 3, 1862, he sustained an injury of the left hip from which he had suffered more or less ever since and which affected the rheumatic trouble. His claim was rejected in December, 1897, on the ground that there had not been a ratable degree of disability from rheumatism since the date of filing, and he was unable, upon special examination, to show that the alleged injury was incurred in the line of duty in the service. From that action he appealed on March 21, 1898.

Accompanying your report upon the appeal is an advisory opinion from the medical referee to the effect that no disability from rheumatism has been shown since the date of filing, but that the appellant has had some affection of the left sciatic nerve and its branches, which is doubtless due to the injury of the left hip alleged by him.

Accepting this opinion as correct, it remains to be considered whether your Bureau was justified in holding that the alleged injury was not shown to have been incurred in the service and line of duty.

The appellant alleges that when his company received their uniforms at Camp Copeland, near Pittsburg, Pa., their other clothes were packed ready to be sent home; that he went to the barracks to get his package, which was lying in an upper berth of the sleeping quarters, and in climbing up to the berth a board gave away and he fell, striking on his left hip and bruising it badly. There was no other person present at the time. He got up and took his bundle out and put it with the other bundles and then went on the cars with his company to Harrisburg, Pa., where they stopped for about half a day, and then went on to Washington. Up to this time he had had no treatment. His hip pained him some, but he thought he would get along and be all right. In about a week, however, it became so bad, on account (as he supposed) of laying out in cold rains near Fairfax, Va., and getting wet, that he was sent to a hospital in Washington, where he remained until discharged. Captain Klotz, of his company, who was a physician, said he had the rheumatism, and that on account of the injury to the hip it had settled there.

The records of the War Department show that he was enrolled July 25, 1862, and was with his company from its organization until September 15, 1862, when he was sent to the Columbia Hospital in this city, where he remained until discharged on a surgeon's certificate of disability January 30, 1863. On the hospital records his ailments appear as "debilitas." The certificate of disability for discharge states:

I certify that I have carefully examined the said Daniel M. Delo, of Captain Klotz's company, and find him incapable of performing the duties of a soldier, because of dislocation of femur into sciatic notch, of five months' standing; happened while in the performance of his duty.

THOMAS R. CROSBY,
Surgeon, U. S. A.

The evidence furnished by the appellant and that obtained by special examination tends to show that he was sound prior to enlistment. While it is impossible to obtain the testimony of eye witnesses in regard to the circumstances of his injury the special examination developed nothing tending to discredit his statement in relation thereto. It is shown that he became disabled about the time alleged; that while in hospital he went around on crutches, with his left leg drawn up; and that "it was said he had been injured in the hip;" also that he said he had rheumatism.

Having considered all the evidence, I am of the opinion that in so far as the question of "line of duty" is concerned it should be determined in the appellant's favor, on the record made at the time of his discharge. While it may be assumed that the officer who made the record had no personal knowledge of the circumstances under which the injury was incurred and probably had no knowledge whatever on the subject except what he derived from the claimant, nevertheless, as has been repeatedly held by the Department, a record of that kind so nearly contemporaneous with the event to which it relates, made at a time when the soldier had (as may be presumed from his subsequent conduct) no thought of applying for pension, and which is not rebutted by any of the evidence developed by a special examination, is more trustworthy than much of the parol testimony upon which we are compelled to rely in adjudicating claims filed twenty-five or thirty years after the war.

The fact that the appellant, in his original declaration, attributed his disability to rheumatism, following fever, ought not to prejudice his case, as it is a well-settled rule that pension claimants should not be held to strict technical descriptions of their disabilities. (Albert G. Hurst, 14 P. D., o. s., 472; Robert Crawford, 1 P. D., 153.) His allegation of "rheumatism affecting the left leg, knee, and hip," taken in connection with his subsequent affidavit relative to the injury, which at the time of its incurrence, appeared to be of little consequence, is sufficient to cover the "affection of the left sciatic nerve and its branches," to which the medical referee says his present disability is due.

The rejection of the claim is set aside and you are respectfully requested to readjudicate it in accordance with the views herein expressed.

PRACTICE—REOPENING—ACT OF MARCH 6, 1896.

WILLIAM HEINEICHS.

The refusal to consider the widow's application for readjudication of her husband's claim in accordance with the provisions of the act of March 6, 1896, on the ground that he (the husband) had no claim for readjudication on file at the date of his death, was error.

A rejected claim may be reopened at any time, upon the filing of proper evidence for that purpose, either by the original claimant or by the person who succeeds to his rights.

Assistant Secretary Webster Davis to the Commissioner of Pensions, September, 22, 1899.

William Heinrichs, formerly a soldier in Company B, First United States Reserve Corps, Missouri Home Guards, filed on July 21, 1890, an application for pension under the act of June 27, 1890, which was rejected in July, 1893, on the ground that a disability ratable under the provisions of said act was not shown. A second application filed by him on May 14, 1894, was rejected in November, 1895, on the same ground. A third application, filed December 30, 1895, was allowed in December, 1896, and pension, at the rate of \$12 per month granted to commence from the date of filing. The pensioner died on the 19th of February, 1897. On December 20, 1897, his widow filed a declaration for the purpose of securing a reconsideration of his claim and a reissue of his certificate to allow pension from the date of filing his original application, which, she claimed, he was entitled to under the provisions of the act of March 6, 1896. This declaration, or application, your Bureau refused to consider on the ground that the soldier had no claim for reconsideration on file at the time of his death. From your decision an appeal was filed on March 19, 1898, the contention of which is that—section 4718 of the United States Revised Statutes gives the widow the right to prosecute any claim and to collect any pension to which the soldier might have been entitled under the act of June 27, 1890.

Section 4718 of the Revised Statutes has been superseded by the act of March 2, 1895, which provides, among other things, that—

The accrued pension to the date of the death of any pensioner, or of any person entitled to a pension having an application therefor pending, and whether a certificate therefor shall issue prior or subsequent to the death of such person, shall, in the case of a person pensioned, or applying for pension, on account of his disabilities or service, be paid, first, to his widow. * * *

Under this law, as under section 4718 of the Revised Statutes, the widow's right to accrued pension is limited to what was claimed by the soldier. She can not set up a new claim in his behalf or enlarge or amend any claim made by him, but she is entitled to all the pension which was due him at the time of his death, or which thereafter became due, under his claim or claims. She may file evidence to complete any claim which he left pending, and if such claim be rejected by your Bureau she has the right of appeal. She has this right, also, if the claim was rejected before his death and he neglected to exercise the right. (William H. Hughes, deceased, 9 P. D., 152.) It follows as a matter of course that she may call attention to any error in the adjudication of a claim filed by him, whether such adjudication occurred before or after his death, and ask to have the same corrected. If her request is denied, she has still the right to appeal. In short, she may do anything in the furtherance of the claim or in securing a proper adjudication thereof that he could do if living.

The soldier in this case applied for and was granted a pension under

the second section of the act of June 27, 1890. It is provided by said section that "such pension shall commence from the date of filing the application in the Pension Office, * * * upon proof that the disability then existed."

It is further provided in the act of March 6, 1896—

That whenever a claim for pension under the act of June twenty-seventh, eighteen hundred and ninety, has been, or shall hereafter be, rejected, suspended, or dismissed, and a new application shall have been, or shall hereafter be, filed, and a pension has been, or shall hereafter be, allowed in such claim, such pension shall date from the time of filing the first application, provided the evidence in the case shall show a pensionable disability to have existed, or to exist, at the time of filing such first application, anything in any law or ruling of the Department to the contrary notwithstanding.

In the appealed case of Preston M. Rohn (10 P. D., 73), I held that "no formal application for the benefit of the act of March 6, 1896, is necessary in claims adjudicated subsequent to the passage of that act;" that said act "merely establishes a rule of practice under the act of June 27, 1890, and was intended to give to claimants under the latter act its full benefits without regard to technicalities in practice;" that "it enjoins the Department mandatorily to allow pension solely upon the proof and allegations made under the act of June 27, 1890;" and that "such mandate may not be disobeyed or rendered ineffective by departmental regulations."

If it was unnecessary for the soldier to make a formal application for the benefits of the act of March 6, 1896, in order to secure the application of the provisions of said act to his case the fact that he did not do so affords no valid reason for refusing to entertain the request of the widow to have the case reconsidered in connection with the provisions of that act. She is not making any new claim. She is simply asking that the claim which her husband made be adjudicated in accordance with the laws in force at the time of adjudication. I know of no reason why her request should not receive the same consideration that a similar request by the soldier would have received.

Furthermore, I am of the opinion that the widow has a right, independent of the act of March 6, 1896, to have her husband's original application reopened and reconsidered upon filing proper evidence for that purpose. As was said in the case of William H. Hughes (9 P. D., 152) "a pension claim has always been considered pending until finally allowed." There is no limitation as to the time within which a motion to reopen a rejected claim may be made—whether made by the original claimant or by the person who succeeds to his rights. (See case of Hughes, *supra*.)

For the reasons stated the action of your Bureau is reversed.

REMARRIAGE—WIDOWS—ACT JANUARY 29, 1887.

DORA V. OTIS, NOW COWLEY (WIDOW).

Claimant was pensioned as the widow of the soldier from July 16, 1890, to July 4, 1892; she remarried July 6, 1892.

Held, That her remarriage barred her further title to pension under the act of January 29, 1887, and that her name was properly dropped from the rolls.

Assistant Secretary Webster Davis to the Commissioner of Pensions, September 30, 1899.

The claimant in this case, Dora V. Cowley, formerly Dora V. Otis, widow of Charles R. Otis, late private, Company G, Sixteenth Regiment United States Infantry, Certificate No. 7524, was pensioned under the act of January 29, 1887, granting pensions to the soldiers' widows of the late Mexican war, from July 16, 1890, to July 4, 1892, when her name was dropped from the rolls by reason of remarriage.

June 29, 1897, claimant filed her declaration for restoration, alleging that not being remarried at the date of the passage of the act her subsequent remarriage does not bar her title to pension.

This claim was rejected by action of the Bureau February 17, 1898, on the ground of claimant's remarriage July 6, 1892, and therefore she has no title to restoration under any existing law.

Claimant has appealed from said last action, her attorneys contending that claimant's remarriage since January 29, 1887, is no bar to pension under the act of that date; that section 2 of said act provides that pensions granted under said act shall continue for and during the natural lives of the persons entitled thereto, and that this provision excludes all conditions on which a pension could be stopped; that claimant is alive, and hence the provisions in the act for a pension during life overcomes the prior law (section 4708, Rev. Stat.) that pension shall cease upon remarriage.

The soldier enlisted in the Mexican war March 21, 1847, and was discharged August 6, 1848. He was pensioned under Certificate No. 15065, and died July 15, 1890.

* Claimant and soldier were married July 6, 1881, and she was pensioned under the act of January 29, 1887, from July 16, 1890, to July 4, 1892; she was remarried to one Covil R. Cowley, July 6, 1892, when her name was dropped from the rolls. It is admitted that Cowley is living and that claimant was living with him as his wife at the time she filed her claim for restoration to the rolls and was not a widow.

It is an interesting question raised by this appeal on account of the language used in the statute under which the pension was allowed to claimant in the second section of the act, and it is not believed has been heretofore directly passed upon by the Department.

The act of January 29, 1887, provides in the first section, among other matters, for a pension to—

the surviving widow of such officers and enlisted men: *Provided*, That such widows have not remarried.

And in construing the proviso the Department held in the case of Hannah Wilson (Mexican war widows, 3 P. D., 283) that remarriage before January 29, 1887, of the widow of a soldier of the Mexican war bars her right to pension under the act of that date.

It is contended in the present case that, although the ruling in said Wilson case is correct, that the act in section 2 provides:

That pensions under section 1 of this act shall be * * * payable only from and after the passage of this act, for and during the natural lives of the persons entitled thereto, or during the continuance of the disability for which the same shall be granted.

That this excludes all conditions on which a pension could be stopped and gives a pension "during the natural life" of claimant, she having a pensionable status at the time of the passage of the act.

Section 4708, Revised Statutes, provides that:

The remarriage of any widow * * * having a pension such pension shall cease.

Every act of Congress granting a pension to widows, with amendments, from the widows of soldiers of the Revolutionary war down to the act of June 27, 1890, unless it be the one under consideration, contemplates, and, as a rule, in some specific language, that there must be or has been widowhood during the time the widow is granted or receives the pension and that the pension is continued only so long as widowhood continues.

It is not believed that the act of January 29, 1887, is an exception.

It is clear from the language of the act, and so construed by the Department in the decision above cited, that if a widow of a Mexican war soldier had remarried prior to the passage of the act, even though she be again a widow by the death of the second husband, is not pensionable, the remarriage having extinguished the right or title to pension. This is not the case with some other laws by specific amendment by act of Congress.

The language used in section 2 of the act under consideration, "during the natural lives of the persons entitled thereto," etc., is admitted to be different from that in any other pension act; but it should be, as this Mexican war act is the only act that grants a pension to a widow when at any particular age, as this does at 62, and on account of disability, as this act does.

A pension when granted under the Mexican war act is granted—

during the natural lives of the persons entitled thereto, or during the continuance of the disability for which the same shall be granted.

The grant of pension in the act is to "the surviving widow" of the soldier. If she remarry she is not the surviving "widow," for she is no

longer a "widow," and section 4708, Revised Statutes, takes effect and says the pension will, from the date of the remarriage, "cease," the widow being no longer "entitled" to a pension.

While it is not so stated in so many words that a pension, under the act of January 29, 1887, to a widow continues only during "widowhood," or the "disability for which pensioned," it was evidently the intent of Congress that the act should be so construed, and that section 4708, Revised Statutes, is not repealed by implication or otherwise by virtue of the provisions of this act, so far as applicable to the same.

Finding no error in the action appealed from, the same is hereby affirmed and the papers in the case herewith returned.

DEPENDENCE—ACT JUNE 27, 1890—WIDOWS.

SALLY HODGIN (WIDOW).

Claimant, who is 72 years of age, and has no other property or income than a farm of 140 acres, worth from \$500 to \$700; two notes, one of \$50, another of \$55; two notes of \$9 each, and personal property worth \$10, is without other means of support than her daily labor, and dependent, within the meaning of the act of June 27, 1890.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
September 30, 1899.*

The claimant in this case, Sally Hodgin, widow of David M. Hodgin, late private Company H, Seventh Regiment Tennessee Volunteer Cavalry, has appealed from the action of the Bureau dropping her name from the rolls as a pensioner.

She was pensioned under the act of June 27, 1890, as the widow of said soldier, from August 16, 1890, to July 6, 1894, when her name was dropped from the rolls on the ground that she was not without other means of support than her daily labor.

Claimant has appealed from said action, contending that it was shown in evidence that the real estate owned by her was worth only \$500, and personal property about \$20; that her income was not to exceed \$50 to \$60 per annum; that she was 72 years of age and could do no work, and was shown to be without other means of support than her daily labor and dependent within the meaning of the act of June 27, 1890.

The facts of the case, as shown by the record and other evidence, are as follows:

Claimant and the soldier were married October 17, 1850, and lived together as husband and wife until the soldier's death, which occurred November 2, 1877.

The soldier enlisted September 24, 1862, and was honorably discharged August 9, 1865. He never made application for pension.

After special examination in 1894, it was determined by the Bureau that claimant was not without other means of support than her daily labor, and her name was dropped from the rolls July 6, 1894.

From the testimony taken on special examination, claimant owns the following property:

A farm of 140 acres, assessed at \$550, and worth from \$500 to \$700. Two notes, one for \$50, another for \$55, which were considered good, and two small notes for \$9 each; other personal property of the value of \$10, and her household goods and farming utensils, worth not to exceed \$100.

W. B. Ottoway, age 59, who was administrator of the soldier's estate, testified, in part, April 28, 1894:

The value of claimant's income from the rent of her farm, I would say from my best information, was from \$50 to \$75 per annum.

When the soldier died there was an indebtedness of over \$1,000, which has been paid from the effects on hand, at his death, such as stock, crops, etc. The taxes on the farm were about \$10 last year. I do not think claimant can make a comfortable living from this farm and keep it up.

I would not be willing to take the farm and board and clothe her, and pay her doctor's bills, for the rent of the farm. If she should rent the farm and the buildings, I should think she would not get over \$50 or \$60 for it, and if there was any repairing I do not think the renter could make the repairs and pay that much rent.

I do not suppose the farm is worth over \$500 or \$600 at the outside.

The testimony of T. J. Bailey, a neighbor, is about the same as that of Ottoway. And there is considerable other testimony of similar purport.

On the other hand, some of the witnesses whose depositions were taken thought the rental value of the farm was about \$100, no one placing it higher.

The special examiner read that portion of the act of June 27, 1890, referring to dependence, and that the widow must be shown to be without other means of support than her daily labor, and would ask the witnesses their opinion as to claimant being dependent. Some answered, "That she was not a pauper," that she did have some means of support; others answered that in their opinion claimant was not dependent, as she had other means of support than her daily labor.

It is not believed that this is a proper method of conducting a special examination. These farmers can not be considered as experts in construing a statute. What the Bureau and the Department want are the facts as to claimant's financial condition, the amount of property and its value, and the income of claimant.

The preponderance of the testimony in the case shows the value of the farm to be about \$600—not to exceed \$700.

The amount of cash income per annum from the farm has varied from year to year since 1890; some years it has been as low as \$20, and after payment of taxes has never exceeded \$60. Taking all the testimony and a fair statement of the annual income of claimant, including

interest on the \$123 she has loaned out, as shown by the four notes, would be \$60—that is, it has never exceeded this amount in any one year, and has often been much less; but for the year 1894, when her name was dropped, it was about \$60. The year she filed her claim, 1890, her income was about \$20.

The witnesses who testified that the rental value of the farm was \$100 gave this as their opinion, and did not give any figures. All the witnesses agree that the farm is a “poor” one.

Claimant has no other source of income except the farm and the \$123 she has loaned out.

At the time of the soldier's death he owned considerable personal property, consisting of live stock, but this was almost all sold to pay debts. Claimant now has only one cow and calf and eight pigs.

She was past 67 years of age in 1894 and is now about 73, and unable, by reason of age and infirmity, to add anything to her income by her daily labor.

After careful consideration of all the testimony in the case I am of the opinion that claimant's name should not have been dropped from the rolls, and that said action was error. The language of the statute is, “without other means of support than her daily labor.”

If a widow, by reason of age or infirmity, is unable to labor for her support, her claim for pension under the provisions of law, justly and reasonably construed, is entitled to greater consideration. She is then wholly dependent upon what income she may receive from other sources than her daily labor.

It can not be assumed that, because such a claimant has a small income from other means of support apart from the proceeds of her daily labor, she is therefore not pensionable. The law does not require that she be reduced to the condition of a pauper before she can be pensioned. It has uniformly been held that when a widow claimant is shown to be in possession of means of support which produces an income considerably in excess of the amount she would be entitled to as a pensioner, she is not pensionable under the statute.

In this case claimant's net income in 1894, when her name was dropped from the roll, did not exceed \$60 per annum, and she was unable to add to this by the proceeds of her daily labor. Under these conditions a reasonable construction of the law would continue her right to pension under the provisions of the act of June 27, 1890.

The action appealed from is therefore reversed, and you are instructed to restore her name to the pension roll from the date of dropping.

MARRIAGE—TENNESSEE—MISSOURI—EVIDENCE.

ANGELINE ADAMSON (ALLEGED WIDOW).

First. The evidence in this case fails to show any ceremonial or common-law marriage between the claimant and soldier, but shows that their relation was illicit in its inception, and continued unchanged until her desertion of soldier in 1885, eight years prior to his death.

Second. A relation illicit in its origin is presumed to so continue until a changed relation is shown, and continuous cohabitation of the parties after the removal of the legal impediment to marriage is not evidence of a change from an illicit to a matrimonial status under the laws of Tennessee or Missouri.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
September 30, 1899.*

Angeline, alleged widow of Thomas B. Adamson, deceased, late private of Company A, Sixth Missouri Volunteer Cavalry, appealed May 26, 1899, from the Bureau action of May 2, 1899, rejecting her widow's claim No. 584616, filed November 3, 1893, under the act of June 27, 1890, on the ground that she was not the widow of soldier, she being unable to establish a valid legal marriage to soldier subsequent to removal of impediment prior to their separation in 1885.

Soldier enlisted August 6, 1861, and was honorably discharged November 10, 1862. He died at Billings, Mo., October 15, 1893.

Claimant in her declaration filed November 3, 1893, alleged that she was married to soldier by Rev. Hayes, at Silver Springs, Tenn., November 18, 1866.

In an affidavit filed August 16, 1895, she testified that she and soldier were married in a boat on the Cumberland River near Nashville, Tenn., November 18, 1886, by Rev. Hayes; that she has been unable to find any marriage record in Tennessee; that she had a certificate from Rev. Hayes of their marriage, but it is lost and can not be found.

In affidavit filed August 7, 1897, she testified that she only remembered two names of eyewitnesses to the marriage ceremony between herself and soldier; that one was Elizabeth Smith and the other Jonas Youngblood; that she could not find them or learn where they were; that she had heard that Youngblood and the minister, Parson Hayes, that married them, were dead; that she could not furnish the evidence of eyewitnesses to said marriage; that she never eloped with soldier prior to the decree of divorce from her first husband, Daniel Davis, "nor was not in adultery at any time with him prior to his said marriage."

Before the special examiner at Billings, Mo., she testified, February 17, 1898, that she was 55 years of age; that she became acquainted with soldier near Richmond, Iowa, in 1863, he having just been discharged from the army, and was married to him on the 18th of November, 1866, on a boat, name not remembered, about 50 miles from Nashville on the Cumberland River, in Tennessee, near a place called Silver Springs, by Parson Hayes, a Baptist preacher, given name not remembered, who gave them a written certificate, with two witnesses, showing their marriage; that she was not acquainted with the preacher, but that he claimed he lived in Tennessee; that the names of the witnesses were Josiah T. Youngblood and Miss Lizzie Smith; that she had been informed that Mr. Youngblood was dead and was unable to ascertain what became of Miss Smith, but had heard that she married Dr.

Moore, somewhere in Kentucky; that she had an idea that their marriage was recorded at Lebanon, Tenn., for the reason that she heard that the preacher, Haynes, lived near there.

She further testified that her maiden name was Angeline York; that she was first married to Daniel Davis, in Clark County, Mo., September 9, 1856, a day's drive from Richland, Iowa, by Squire Farris; that after their said marriage they returned to Richland, Iowa, and lived together, off and on, up to the beginning of the war, and then separated; that she had not been living with Davis for five or six years prior to her marriage to Adamson; that she hears Davis got a divorce from her on the ground of desertion and adultery October, 1866, a little over a month prior to her marriage to Adamson; that she did not live with Adamson prior to their marriage; that he took her to Liberty, Dekalb County, Tenn., in the spring of 1866, and they lived there until the following November, when they started to Illinois, and thence to Richland, Iowa; that she taught school at Liberty, Tenn., in the summer of 1866, and Adamson staid part of the time at his Uncle Jeff Rulis's, and part of the time boarded in Liberty; that they did not keep house together then, but did when they returned there in 1870, where they lived two years; that Adamson's father lived and died there; that when they lived there in 1866 they occupied the same apartments sometimes when he came to see her, but not as man and wife; that after their marriage in 1866 they lived together continuously until April 23, 1885, when she went on a visit to her parents, who were living at Eddyville, Iowa; that while she was on that visit she heard that Adamson had took up with another woman—Mrs. Brown, of Billings, Mo.—and took her into their house; that when she received this information her father, and brother—William A. York, of Mingo, Iowa—would not permit her to return to Adamson, and they never lived together afterwards; that when she left him she had no intention of deserting him, but after her arrival in Iowa she received letters from several neighbors, women, that Mrs. Brown and her husband had moved into their house, and that her husband and Mrs. Brown were intimate.

Question. While you were in Iowa on that visit did you commence proceedings for a divorce from Adamson?

Answer. I did not. I returned here (Billings, Mo.) from Iowa about the 20th of October, 1893, having heard of his (Mr. Adamson's) death on the 17th of October, 1893.

Question. Do you know whether your late husband, Mr. Adamson, ever got a divorce from you, or commenced proceedings to get a divorce from you?

Answer. He never got a divorce from me, but I heard that he commenced proceedings at Ozark for a divorce from me, but withdrew the suit. I heard that his charge was desertion.

She further testified as follows:

After our marriage, in 1866, we returned to near Richland, Iowa, and lived there until we went back to Liberty, Tenn., in 1870. From Liberty, Tenn., we moved to Eddyville, Iowa, and lived there from 1872 to 1875, when we moved to Mexia, Tex., near Houston. We lived in Mexia until November, 1879, when we moved to Ozark,

in this county. We lived at Ozark (Missouri) until March, 1880, when we moved to this place (Billings, Christian County, Mo.), and this has been my home since.

After some disagreement between us about my youngest brother, Calvin V. York, living with us, I visited my brother at Verona, Lawrence County, Mo., and consulted Squire Grammar (deceased), of that place, about getting a divorce from Adamson. Mr. Grammar made notes of what I told him, but I do not think he even filed a suit for divorce. As a ground for divorce I alleged against Mr. Adamson ill treatment, drinking, and nonsupport. He was also awfully jealous. I made up with him and lived with him after that until I went to Iowa.

Question. Did Mr. Adamson ever claim that your marriage to each other was not legal?

Answer. He wrote me when I made that visit to Iowa that our marriage was not legal, but he wrote me afterwards, calling me "Dear wife" and offering me \$100 if I would join with him in signing some deeds to lots in this town. I did not sign the deeds, and he sold the lots. I have never brought suit for my interest in said lots because I had no means to pay attorneys.

After the death of Mr. Adamson his nephews, Len Walker, John E. Adamson, and Hiram Garrison, were appointed by the probate court of this county as administrators of his estate, and I was given a life lease on this house and lot and \$200 by compromise. * * * I heard that Mr. Adamson's estate amounted to between \$2,000 and \$3,000, and that he owed over \$1,000. * * * After our marriage Mr. Adamson and I were recognized as man and wife by the neighbors where we lived and by our relatives on both sides. Mr. Adamson always spoke of me as his wife and he always introduced me as his wife. I did not have any child or children by my first marriage to Davis, but I had one child by my marriage to Adamson, who died in infancy when he was about an hour old. I never heard of Mr. Adamson living with any other woman as his wife. He did not live with Mrs. Brown as his wife.

After Mr. Adamson withdrew his suit for divorce he wrote me, addressing me as his wife. I joined with him in making deeds when he sold property in Eddyville and Trenton, Iowa, in 1870 and 1874, and I joined with him in making the deed when we sold our home in Mexia, Tex., in 1879.

The affidavit of the attorney, Giltman, that he obtained the decree of divorce of my first husband, Davis, from me, was forwarded to me by my mother, now dead, immediately after it was obtained, and I received it at Liberty, Tenn., before I married my second husband. I was under the impression that Parson Hays wrote on the back of said affidavit a statement to the effect that he had married us. I know that said affidavit was handed to Parson Hays to look at before he performed the marriage ceremony. We did have a nice printed marriage certificate that was framed and hung up in our house for several years, but Parson Hays did not sign that certificate. His name, however, was to it. When I made that visit to Iowa and returned here after the death of Mr. Adamson I was unable to find the framed copy of said marriage certificate. My late husband, Adamson, was born in 1837, and I am quite certain that he never had been married prior to our marriage.

Within a few weeks after I started on the visit to Iowa Mr. Adamson advertised in the paper here that I had left his bed and board without just cause, and the editor sent me a copy. That charge was false. I did not come back right away because he had that woman Mrs. Brown in the house and did not want me, and my father and brother did not want me to come back. When I heard of his death I came back here to claim my rights as his widow.

Before the special examiner October 25, 1898, after having heard read the adverse testimony against her, she testified in response to the question as to the names of those of whom her husband was jealous, as follows:

I do not know that I could do that or not. He was jealous of a great many men. He was jealous of someone nearly everywhere we lived, and without just cause. He

The soldier and the appellant were poor laboring people residing in the city of St. Louis, Mo., he being by trade a hod carrier. The soldier's health became seriously and permanently impaired by disease of lungs (consumption), so that he was unable to endure the hard labor incident to his calling, and had to give up his job and seek less arduous employment. He was unable to obtain other work, his health steadily declined with the progress of his disease, he became very feeble, melancholy, and was at times mentally unbalanced, as is shown by the fact that he was for a time treated in hospital on account of his mental condition a short time before he disappeared. In the meantime this appellant had endeavored to earn a support for herself and the soldier by taking in washing, and doing other such work, but about a year prior to the soldier's disappearance her health also failed, and she was unable to earn even the small pittance that had so far kept them alive.

The evidence shows that they were compelled to pawn and sell all their household effects, except one or two absolutely necessary articles, to avoid starvation, and in July, 1887, the appellant was taken seriously and dangerously ill and had to be sent to hospital.

Under these circumstances, after repeated failures to obtain work, both mentally and physically enfeebled by a wasting and incurable disease, with starvation staring him in the face, his wife dangerously ill in a public hospital, and with no prospect or hope of relief in the immediate future, the soldier, who was rather an ignorant German, declared his intention to take his own life and put an end to his misery in this world. Immediately thereafter, on July 22, 1887, he disappeared, and although it was not absolutely or positively known, it was universally believed and accepted as a fact by all conversant with the circumstances at the time, that he had thrown himself into the Mississippi River and was drowned. His body was never recovered, or if recovered was unrecognizable, and although such effort as the limited means of the appellant and her friends permitted was made to trace him, nothing has ever been seen, heard, or known of him since said date.

These facts were accepted as sufficient to raise the legal presumption of the fact of the soldier's death under the provisions of the act of March 13, 1896. Said act did not in any way change, modify, restrict, or limit the meaning or scope of the well-known common-law rule relative to the presumption of death after seven years unexplained absence. It was merely, as has been declared by this Department on more than one occasion, a legislative restatement of said rule, and simply required its application in the consideration of claims filed under the pension laws, where the facts proved were such as to raise such a presumption, and pension cases involving a question of presumption of death from seven years' unexplained absence, arising under said act, are to be considered and determined by the same rules, considerations, and authorities as obtain and control in the consideration of such questions arising at common law.

All authorities agree that the legal presumption of death from seven years' unexplained absence goes merely to the *fact* of death and not to the *time* of death.

Up to the lapse of seven years the presumption of the continuance of life obtains, and the burden of proof lies upon the party asserting the death within that period. After the lapse of seven years, without intelligence concerning the person, the presumption of death obtains, and the burden shifts to the other party; but there is no presumption as to the time when the person died, and the burden of proving his death at any particular time is upon the party who asserts it. (Greenleaf on Evidence, section 41, and authorities cited in note b, thereto.)

There is no presumption as to the death within the seven years. (Davie v. Briggs, 97 U. S., 628; Spencer v. Roper, 13 Fed. (N. C.), 333; State v. Moore, 11 Id., 160; McCarter v. Camel, 1 Barb. (N. Y.), ch. 455; Hancock v. American Life Ins. Co., 62 Mo., 26.) Consequently, although the fact of death will not be presumed until the end of seven years, the actual time or date of the death within the seven years may be proved as a fact by direct or circumstantial evidence.

The most usual form of such evidence is that which shows that the person in question was either in such a bad state of health that it is probable that he is dead at the time specified, or that he has been exposed to some specific danger, such as shipwreck or railroad collision, which renders it probable that he was then destroyed.

This and similar evidence will justify the finding of death at a specific date inside of the seven years by the jury, but mere unexplained absence short of that time will not. (Greenleaf on Evidence, section 41, note b, and authorities there cited.)

While, therefore, the procedure adopted in this case is a safe and proper practice to follow as a general rule, and in all cases where the evidence is not sufficient to establish the time of death at some date within the period of seven years unexplained absence, yet in this case I am decidedly of the opinion that the facts established by the evidence unmistakably point to the soldier's death as having occurred at or about the date of his disappearance, and should be accepted as sufficient to establish his death prior to the filing by this appellant of her first application for pension in the absence of any fact or circumstance in evidence leading to a different conclusion. He is shown to have been poor, out of work, in feeble health, the victim of an incurable disease, mentally unbalanced, placed at the time under most painful and distressing circumstances, in actual want of the bare necessities of life, with no prospect of relief. In this condition and with these surroundings he declared his intention to commit suicide, and immediately disappeared, and no trace of him has since been found. The soldier belonged to a class of Germans which statistics show are exceedingly prone to self destruction when subjected to great misfortune or intense mental suffering and anxiety, and all the surrounding circumstances indicate in the strongest and most convincing manner that he carried out his declared intention and put an end to his existence on or about the date of his disappearance.

I am therefore of the opinion that the evidence should be accepted as sufficient in this case to show the death of the soldier on July 22, 1887, the date of his disappearance, and, consequently, the action commencing appellant's pension from the date of filing her second application, July 11, 1898, is hereby reversed and set aside, and you are requested to reissue her certificate so as to make said pension commence from September 22, 1890, the date of filing her first application for pension under section 3, act of June 27, 1890, as widow of said soldier.

DECLARATIONS—EXECUTION OF PAPERS—ALABAMA STATUTE.

SEABORN WILLIAMS.

Within the contemplation of the law, in the State of Alabama, the official act of the clerk of a probate judge therein is the official act of said judge; therefore, a declaration for pension is made before said judge if executed in the presence of his clerk only, and is legally executed within the purview of section 4714, Revised Statutes, and the act approved July 1, 1890.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
September 20, 1899.*

The claimant, Seaborn Williams, served in Company H, One hundred and thirty-seventh United States Colored Volunteer Infantry, from April 8, 1865, to January 15, 1866.

On July 17, 1890, was filed his declaration for pension under the act of June 27, 1890; the claim was rejected February 25, 1898, upon the ground that the declaration was invalid—

* * * the name of the probate judge, A. E. Coffee, before whom it purports to have been executed was signed by J. J. Meadows, probate clerk of the court, who is without legal authority to administer oaths.

From this action an appeal was entered June 7, 1898.

The declaration purports to have been executed before A. E. Coffee, probate judge, Lowndes County, Ala., July 12, 1890. The seal of said court is attached. The signature to the certificate of execution is as follows: "A. E. Coffee, Judge Probate."

A special examination of the claim developed that in fact the execution of the declaration was before J. J. Meadows, clerk of the probate court, who signed the name of the probate judge to the certificate of execution and affixed the seal of the court thereto.

There is no pretense of fraud, or any attempt at deception. The question is whether the execution of the declaration is in accord with the law relative thereto.

Section 4714, Revised Statutes, provides that—

Declarations of pension claimants shall be made before a court of record or before some officer thereof having custody of its seal, said officer hereby being fully authorized to administer and certify any oath or affirmation relating to any pension or application therefor.

And by act approved July 1, 1890, declarations to be hereafter made or used in any pension case may be taken—

* * * by any officer authorized to administer oaths for general purposes in the State, city, or county where said officer resides.

Probate courts of the State of Alabama are courts of record. (See provisions of chapt. 92, Civil Code of Alabama, 1896; *Knabe v. Rice*, 106 Ala., 516.) On its face, therefore, the certificate of execution of the declaration is valid. For, by section 4714, Revised Statutes, the judge of a court of record is authorized "to administer and certify any oath relative to any pension or application therefor."

Now, in the contemplation of the law, was the declaration executed before said judge, the facts being as above set forth?

Section 702 of the Civil Code of Alabama (1876) provides that the judges of probate have authority—

1. To administer oaths and take and certify the same in which the administering such oaths and taking such affidavit is not conferred expressly to some other officer.

6. To employ at his own expense a clerk for whose official acts he is responsible; and such clerk shall have the following powers: 1. To do all acts not judicial in their character. * * *

The judge of probate in Alabama is authorized to administer oaths for general purposes. Such acts are not judicial, as there is no question to be determined. The act is ministerial. The clerk of the probate judge is authorized to do all acts not judicial in their nature.

The ground of rejection assigned by the Bureau contains an assertion as a fact that the declaration was not executed before the judge of probate but before his clerk. However, the legal question, viz, Whether, in law, the certificate of execution was made by the judge of probate, must not be lost sight of. The facts are that the clerk of the probate judge administered the oath and affixed the signature of the judge to the certificate of execution.

In the case of *Halso v. Seawright* (65 Ala., 432), the facts were as follows: Real action for the recovery of lands. Plaintiff deduced title to the lands from a mortgage—

* * * the acknowledgment of which is in due form, purporting to have been taken and certified by the judge of probate of the county of Butler. It was shown by parol without objection that the acknowledgment of the execution of the mortgage was not taken by the judge of probate, but was in fact taken and certified by his clerk duly appointed.

So the signature of the judge of probate was signed by his clerk, without addenda showing that it was thus written, to the certificate of acknowledgment, and the act was before the clerk. These particulars as to facts are like those arising in the case under consideration.

Relative to the question of law arising in the case of *Halso v. Seawright*, the court said:

Where on the probate judge was devolved the duty of taking and certifying the examination of the wife to an alienation of a homestead, the preexisting statute

intervened and authorized the clerk of his appointment, and in his name to take and certify it. For all legal purposes, and in contemplation of law, the act of the clerk is the act of the judge. Unlike the clerk of the circuit court, or the register in chancery, or the clerk of this court, the clerk of the probate court is not an independent officer clothed with distinct official power and duty to be exercised upon his own responsibility. He is a mere agent or deputy acting for and in the name of a principal who is answerable for his fidelity. It is the power of the principal he can exercise, so far as the law permits its delegation.

So, by the laws of the State of Alabama, the official act of the clerk of a judge of probate is the official act of said judge. Hence, in contemplation of the laws of said State, the execution of the declaration in this case before such clerk was before the judge of probate, as much so as if it had been made before the person who held said office.

There is nothing in the wording of either section 4714, Revised Statutes, or the act approved July 1, 1890, warranting the belief that anything further was required in the execution of a declaration for pension than that the act of execution should be performed before one of the officers coming within the specified classes in that manner in which such officer is directed and permitted to perform his duties, and in that sense contemplated by the laws of the particular State in which said act takes place.

Therefore, in conformity with the construction of the laws of Alabama made by the supreme court of that State, it must be held that the certificate of execution to the declaration filed in this claim is the certificate of the probate judge of Lowndes County in contemplation of those laws.

Said judge was at least an officer of a court of record, and was also authorized by law to administer oaths for general purposes. In either capacity he was competent to certify to the execution of the claimant's declaration for pension at the date it was made.

As the declaration was legally executed before an officer specified by the law for the making of the same, the action of the Bureau in rejecting the claim upon the ground assigned was error. Accordingly, said action is reversed, with directions to readjudicate in accordance herewith.

MARRIAGE AND DIVORCE—EVIDENCE.

SARAH NEWBERRY (WIDOW).

Claimant maintained an illicit relation with one Henry Davis from about 1869 to 1882, in the States of Illinois and Missouri, when they separated and both married thereafter, Davis marrying in Sedalia, Mo., in 1884, and claimant marrying soldier in 1885, by a ceremony, with whom she lived as his wife until his death in 1891. Claimant and Davis both swear that they were never married to each other, and the evidence does not show that they were ever regarded as husband and wife in the communities where they lived.

Held, That the cohabitation of claimant and Davis was illicit and not matrimonial, and that her marriage to the soldier was valid.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
September 20, 1899.*

Sarah, alleged widow of Lewis Newberry, late private Company G, Fifty-fifth Massachusetts Colored Infantry, appealed March 9, 1898, from the Bureau action of October 31, 1895, rejecting her widow's claim, No. 517725, filed June 23, 1891, under the act of June 27, 1890, on the ground that she is not the legal widow of soldier, being the legal wife of Henry Davis by a prior marriage.

It is contended that the evidence shows that claimant is the widow of soldier, and that she was never the wife of Henry Davis.

The evidence in this case shows that soldier enlisted June 5, 1863, and was honorably discharged August 29, 1865; that a ceremonial marriage was performed between soldier and claimant by the Rev. C. H. Webb at his house in Hannibal, Mo., on the 30th of May, 1885; that the soldier and claimant after their marriage continued to live and cohabit as husband and wife in Hannibal, Mo., up to the time that soldier was taken to the insane asylum about a year and a half before he died, which was February 19, 1891.

The evidence further shows that the soldier had been previously married, but that his first wife died October 5, 1884, and prior to his marriage to claimant; that claimant prior to her marriage with soldier had cohabited with one Henry Davis in Illinois and Missouri for some thirteen years, or from about 1869 to 1882, when they separated and both married other parties, claimant marrying soldier as aforesaid, and Davis marrying in Sedalia, Mo., in 1884.

Both claimant and Davis testify that they just took up with each other; that there was no marriage ceremony performed or any pretense of any, and that they were never married to each other. The special examiner reports that he believed they stated the facts. An examination fails to disclose any evidence of marriage between them aside from cohabitation and the fact that claimant had three children by Davis.

Rev. O. H. Webb, the clergyman who married claimant to soldier, testified before the special examiner that he saw Henry Davis at claimant's house before her marriage to soldier, and that they were living together, but he heard they were never married; that he had known claimant for twenty years and that she was married to soldier under the name of Sarah Schropshire.

Stephen W. Holder, white, reputation good, testified before the special examiner that he had known claimant all his life; that he found her living in Hannibal, Mo., with Henry Davis, but Davis went away some time before claimant was married to soldier; that he did not know whether they were married or not; that Davis didn't stay with claimant all the time as a man would that was married to his wife.

Ida Slayton, aged 23, a daughter of soldier by his first wife, testified before the special examiner that she did not know whether claimant was ever married to Henry Davis or not, but thinks claimant told Rev.

Mr. Webb, when she was married to soldier, that she had never been married before.

No witness has been found who could testify that claimant and Davis were regarded as husband and wife by their acquaintances, friends, or neighbors.

Several witnesses have testified to the illicit relations between claimant and Davis; that they were never married or regarded as husband and wife; that Davis always contended that she had no claim on him as her husband, never spoke of her as his wife nor she of him as husband; that some of her friends remonstrated with her for her manner of living with Davis, and urged her to marry him; that she refused, stating that she would never marry him, stating as a reason that Davis was "so overbearing, dissipated, and mean to her;" that they finally ceased living together, Davis leaving Hannibal, and claimant returning to one of her friends, Mary Newbolt, with whom she lived till she married soldier. There is no evidence of collusion between claimant and Davis or her witnesses.

While common-law marriages are valid in the State of Missouri (64 Mo., 552), and such marriages may be proved by evidence of cohabitation and general repute, yet the evidence in this case wholly fails to establish general repute in the sense in which that term is defined by the courts.

As stated by the court of appeals in the case of *Barnum v. Barnum* (42 Md., 251)—

Marriage may doubtless be proved in civil cases, other than in actions for seduction, by the actions and conduct of the parties, but where reputation is relied on, that reputation to raise the presumption of marriage must be founded on general and not on divided or singular opinion; and where reputation in such a case is divided, it amounts to no evidence at all.

See also *Boone v. Purnell* (28 Md., 607, 627); *Cunningham* (2 Dow., 482, 511); *Yardley* (75 Pa. St., 207, 212); and *Bishop on Marriage, Divorce, and Separation*, par. 936 and note 5.

I am of the opinion that the evidence in this case not only fails to prove prior marriage of claimant, but on the contrary shows that claimant's relation with Henry Davis was illicit, not matrimonial.

Cohabitation and general reputation alone never constitute marriage, although they are facts from which marriage may be presumed. *Yardley's Estate* (25 P. F. Smith, 25); *Reading Fire Insurance and Trust Company* (113 Pa., 204); *Hunt's Appeal* (86 Pa. St., 294); 1 *Bishop, Marriage, Divorce, and Separation*, par. 633; *Stuart on Marriage and Divorce*, par 46, and *Ann Blue* (7 P. D., 122).

The evidence also establishes a ceremonial marriage between claimant and soldier Lewis Newberry, on May 30, 1885; and the law presumes the legal capacity of the parties to contract the marriage relation. (*Mary C. Buckley*, 8 P. D., 195.)

It therefore follows that the Bureau action rejecting her claim on the grounds stated was error, and said action is accordingly reversed, and the papers in the case are herewith returned.

MARRIAGE AND DIVORCE—EVIDENCE—ADMISSIONS.

MARY ANN JONES (WIDOW).

Claimant first stated that she was previously married to one Neil in the Isle of Man, England, by whom she had one child, a daughter, and that her said husband was dead. Evidence taken on special examination shows claimant's maiden name to have been Neil, and that her daughter was the fruit of an illicit relation with a man in England, and claimant now admits this, claiming that she had represented herself as a widow to conceal from said daughter that she was an illegitimate child, and it is held that there was no impediment to her marriage to the soldier.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
September 20, 1899.*

Mary Ann Jones filed in your Bureau on June 26, 1891, an application for pension under the provisions of section 3, act of June 27, 1890, as the widow of Thomas Jones (deceased), late private Company C, One hundred and thirty-first New York Volunteer Infantry, alleging the death of said soldier on May 7, 1880, leaving her without other means of support than her daily labor. Said claim was rejected on February 11, 1899, upon the ground that she had another husband who was not divorced from her and who was not shown to be dead at the date of her marriage to the soldier.

From said action appeal was taken on April 20, 1899.

It was alleged by this appellant that both the deceased soldier and herself had been twice married prior to their marriage to each other. The evidence shows the death of both of the previous wives of the soldier prior to his marriage to this appellant. The appellant at first alleged that she was first married, about 1858, to one Robert Neil, or Kneale, in the Isle of Man, England, before coming to this country, by whom she had one child born, a daughter named Louisa, with whom she is now living and who is supporting her. She testified on several occasions that her alleged first husband Neil, or Kneale, died in the Isle of Man before she left there, and she filed a duly certified transcript from the "Registry Book for Burials" in the parish of Kirk Braddon in the Isle of Man, showing that one Robert Kneale, aged 20, had died and been buried there on October 26, 1852, whom she declared under oath to be identical with her first husband. She appears to have lived in Liverpool, England, where her daughter Louisa was born, in domestic service for some years, during the time of the civil war in this country, and to have come from that place to New York City about 1865 with an American family, with whom she lived for some years as a domestic servant, during which time she was known as Mrs. Neil, and her daughter as Louisa Neil, and to have married in the latter city her second husband, one Henry Bull, who is shown to have died on January 16, 1873. The evidence shows that the appellant and the deceased soldier were married in March, 1877. It appeared from the statements of the appellant herself, the testimony of her daughter

Louisa, and a comparison of dates, that the Robert Kneale who died in the Isle of Man in 1852, and a record of whose burial was furnished by appellant as above mentioned, could not have possibly been her first husband and the father of Louisa. The case was, therefore, specially examined, when the appellant at first reiterated her former statements relative to her first marriage to Neil, or Kneale, but upon being confronted with the inconsistencies and incongruities of her story, and on skillful cross-examination she confessed very reluctantly that she had never been married prior to her marriage to Bule, and that Louisa had been born out of wedlock. In view of her repeated sworn statements that she had been married to the father of Louisa before she came to this country, it was deemed that the death or divorce of her first husband was not shown and the validity of her marriage to the soldier not satisfactorily established, and her claim was rejected solely for this reason.

I am of the opinion that the evidence in the case will not sustain this conclusion. In the first place, the only evidence in the case, of any kind whatever, tending to show that the appellant had been married prior to her marriage to Bule in New York City is her own statement to that effect. Although, as a rule, the admissions of a party against his own interest are to be taken most strongly against him and can not be offset by other statements in his own favor, the circumstances of this case seem to be peculiar, and present considerations which tend very strongly to the conclusion that the latter statement of this appellant is the true one and gives the real facts in the case. Although the appellant appears to have been an ignorant and uneducated person, and a domestic servant until her marriage to Bule in New York City, she at the same time is shown to have led a most reputable life and to have been greatly respected and trusted by those who employed her, and to have had a high sense of self-respect and personal honor. The confession that she had never been married to the father of Louisa was drawn from her with great difficulty, and only after careful and skillful cross-examination, and was made with the greatest reluctance, only after she was confronted with the fact that her first story would not conform to the facts in her case concerning which there could be no controversy. She stated at the time that this had been the secret of her life, and that her one and controlling motive for many years had been to conceal the fact of her early shame and disgrace and to protect her daughter from the social stain and ignominy incident to a knowledge of her illegitimate birth, until it had "become a second nature with her," and she was only led to state the true facts when she could no longer help herself. The evidently sincere and genuine grief and shame of the appellant when the confession of her youthful indiscretions was forced from her, and the very apparent fact that, in her mind at least, this circumstance in her life was what it was most important for her to conceal, precludes the idea that her last statement had been made for the purpose of bolstering up and aiding in the prosecution of this claim for pension as the widow of the soldier. It is very apparent from the

circumstances of this case, and the manner in which it was made, that the statement by the appellant that she had never been married to the father of her daughter in England, was what was deemed by herself as a confession against her own interests, and that she would have willingly sacrificed all her claim and title to pension could she have avoided making it.

Furthermore, the appellant's last statement is fully corroborated by the testimony of an older sister, now living in Lincoln, Nebr., and reported to be of good character and standing and a thoroughly reliable and credible witness. She swears that the appellant was living with her in Liverpool, England, when her daughter Louisa was born, about June, 1859, and that the child was illegitimate, as the appellant was not married then, and never was married until after she came to this country and married Bule in New York City. She also testifies that the appellant's maiden name was Neil or Kneale, and that she called herself Mrs. Neil after Louisa's birth, in order to conceal the fact that she was a single woman. This witness, also, is reported by the special examiner to have testified very reluctantly to the fact that her sister, this appellant, had given birth to an illegitimate child. In view of this evidence and the other circumstances in the case above mentioned, I am convinced that the last story of the appellant is the true one, and I am of the opinion that the evidence is not sufficient to establish the existence of a marriage of the appellant in England prior to her alleged second marriage to Bule in New York City, notwithstanding her repeated statements to that effect first made in this case.

If the marriage of appellant to the father of Louisa in England is not established, then, clearly, no legal impediment to her marriage to the deceased soldier is shown to have existed, and said marriage was legal and valid and she must be accepted as his widow under the evidence in this case.

The rejection of this claim upon the ground stated is, therefore, hereby reversed and set aside, and you are requested to cause the same to be reopened and readjudicated upon its merits, accepting the appellant as the deceased soldier's widow.

RATE-RANK-DEPENDENT PARENTS-ACT JUNE 27, 1890.

ELIZABETH DARLING (MOTHER).

Pensions for dependent parents are rated in accordance with the provisions of section 4707 of the Revised Statutes as amended by the act of March 19, 1886, the first section of the act of June 27, 1890, only amending said section to the extent of requiring claimants to prove present dependence instead of dependence at the date of the son's death.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
September 22, 1899.*

Replying to your inquiry of June 30, 1899, in connection with the departmental decision of June 21, 1899, in the dependent mother's claim

of Elizabeth Darling, mother of Franklin Richard, certificate numbered 127951 (10 P. D., 244), as to whether it is to be—

understood that the rank of a soldier in the service is to be taken into consideration in those cases where the dependent parent has filed an application subsequent to June 27, 1890, and relies upon present dependence to prove the claim,

I have to say that the rank of the son of a dependent parent claimant is to be taken into consideration in those cases where application is filed subsequent to June 27, 1890, the same in all respects as if the application was filed prior to June 27, 1890.

For reasons stated in said departmental decision of June 21, 1899, the last proviso to section 2 of the act of June 27, 1890, that "rank in the service shall not be considered in applications filed under this act," does not, and was not intended to, apply to dependent parents' claims filed under section 4707, Revised Statutes, as amended by the first section of the act of June 27, 1890, but was intended to apply *only* to those beneficiaries who were designated in sections 2 and 3 of said act, and whose rate of pension, as well as title, was created by that act.

Had Congress intended to repeal the provisions of section 4707 and reduce or in any manner modify the rate of pensions of dependent parents, that intent would have been manifested by clear, apt, and appropriate language. Repeals by implication are not favored. (South-erland on Construction of Statutes, paragraphs 138 and 151.)

Sections 2 and 3 of the act of June 21, 1890, provided for a new scheme of pensions having no reference to disability or death due to army service, while section 1 of the act of June 27, 1890, related to the old scheme, requiring disability or death to be the result of military or naval service. The scheme of abolishing rank rate refers, naturally, to the new scheme, and not to the old.

As stated by Southerland on Statutory Construction, section 147, page 199:

The reenactment of some of the sections of one act, in a subsequent one providing for a different scheme, is not a repeal by implication of these sections of the first act; nor does a provision in the second act suspending the operation of the similar sections in that act have the effect to suspend the operation of those in the first act.

The language used in said proviso to section 2 of the act of June 27, 1890, applies only by its plain terms to applications "filed under this act," and has no reference, by implication even, to applications that are filed under an act that was amended merely as to a matter of proof by the first section of said act of June 27, 1890.

The right of a dependent mother to "the same pension as such officer or other person would have been entitled to had he been totally disabled" has existed since July 14, 1862. (See Digest of Pension Laws, 1885, p. 496, sec. 3; 12 Stat. L., 566, 567.)

The first section of that act provides the rate for officers, noncommissioned officers, musicians, and privates, for a total disability.

Said section 3 of the act of July 14, 1862, then provided:

That when any officer or other person named in the first section of this act shall have died, * * * or shall hereafter die, by reason of wounds received or disease

contracted while in the service * * * and in line of duty, and has not left, or shall not leave, a widow or legitimate child, but has left or shall leave a mother who was dependent upon him for support, in whole or in part, the mother shall be entitled to receive the same pension as such officer or other person would have been entitled to had he been totally disabled.

This grant to the dependent mother is now embodied in section 4707, Revised Statutes, and Congress, instead of showing any disposition to reduce the rate of the mother's pension, increased the rate of those dependent mothers whose sons were not commissioned officers from \$8 to \$12 per month by the act of March 19, 1896, thus amending section 4707 as affecting the dependent mother's rate.

It is to be borne in mind that said act of March 19, 1886, only applied to those who were entitled to receive a less rate than \$12 per month, and in no manner affected those dependent relatives who were entitled to receive a rank rate of pension, or a rate in excess of \$12 per month.

If it is contended that the dependent parents' rate is fixed by the act of June 27, 1890, then the rate of the dependent parent should be \$8, not \$12, per month, as \$8 per month is the only rate provided for dependent pensioners in the act of June 27, 1890. Why, then, are dependent parents' claims adjudicated at \$12 per month, \$4 per month more than the dependent widow receives under the act of June 27, 1890?

If it be said that the dependent mother's rate is fixed by the act of March 19, 1886, as heretofore stated, a mere reference to that act shows that it only referred to and included within its provisions those—widows, minor children, and dependent relatives * * * entitled to receive a less rate than * * * \$12 per month.

As the widow or dependent mother was at that date entitled to receive the rank rate of their husband or son, and as the lowest rank rate was more than \$12 per month, the widow or dependent mother entitled to a rank rate were not the beneficiaries named in the act of March 19, 1886, and were not affected thereby.

If, then, the rate of a dependent mother whose son was a commissioned officer was not fixed at \$12 per month by the act of March 19, 1886, where is the authority in any law to grant her a pension of \$12 per month, and what law fixes her rate? Clearly the act of July 14, 1862, sections 1 and 3, paragraph 12, Statutes at Large, pages 566, 567, and now embraced in sections 4695 and 4707, Revised Statutes.

To hold that the proviso to section 2 of the act of June 27, 1890, that "rank in the service shall not be considered in applications filed under this act," repeals, by implication, the provision as to rate of dependent parents' pension as prescribed by sections 4695 and 4707, Revised Statutes, is not only to violate all rules of construction of statutes, but would force us to the admission that it also repealed the provision of the act of March 19, 1886, which was, in effect, but an amendment of said section 4707, so far as it affected the rate of those dependent mothers entitled to less than \$12 per month.

If, then, section 4707, and its amendment of March 19, 1886, are

repealed by implication by the proviso of section 2 of the act of June 27, 1890, where is there left any rate for a dependent mother?

Mandamus would unquestionably lie against a commissioner, or Secretary of the Interior, who refused to recognize rank rate, as the determination of that question alone is fixed by the law, and no discretion is left to the administrative officer when the undisputed facts establish the right to pension, the only remaining duty being the insertion of the legal rate. In such a case the duty of naming the rate is ministerial, not discretionary or judicial, and a refusal to perform a plain ministerial duty could undoubtedly be enforced by the courts. The law names the rate.

If it be said that a mother should not receive a rank rate, because a soldier's widow under the act of June 27, 1890, is entitled to but \$8 per month, and that rank rate is not recognized in widows' claims under said act of June 27, 1890, it should be borne in mind that the widow is not required to prove that her husband's death was due to the service in order to secure a pension under that act; while the dependent mother, under section 4707, as amended by the first section of the act of June 27, 1890, is required to prove that her son's death was the result of his service before she can obtain a pension as a dependent mother.

If the widow can establish the fact that her husband's death was due to the service, she, like the dependent mother, is entitled to a rank rate, in all respects the same as the mother.

The phraseology of your inquiry would indicate that you are of the opinion that a dependent parent could file a claim subsequent to the act of June 27, 1890, under section 4707, as it existed prior to that date. Such I do not conceive to be the case, as, by the very terms of the amendment of June 27, 1890, to section 4707, the pension can only commence from the date of filing the application; and so, under the provisions of section 2 of the act of March 3, 1879, their pensions, unless filed prior to July 1, 1880, must commence from date of filing the application.

There would, therefore, be no period of time for which a dependent parent (not insane) could draw a pension prior to filing an application.

Dependence at date of death of son, or past dependence (except as to insane parents), becomes immaterial in all dependent cases filed since June 27, 1890, except as such fact may have a bearing upon present dependence. In other words, if present dependence is shown (dependence at date of filing the application subsequent to June 27, 1890), past dependence or dependence on the son at the date of his death (unless his death occurred on the same day that the application was filed) becomes immaterial and should never be required. Applications should be filed under the law as it exists at the date of filing, not as it existed prior thereto, where the claim, if allowed, is required to commence from the date of filing the application.

To state the case in another form: All applications of dependent parents filed since June 27, 1890 (except in case of insane parents), are filed under section 4707, as amended, and there is no authority for filing a dependent parent's claim subsequent to June 27, 1890, under section 4707, as it existed prior to the amendment of that date, except in the case of insane parents.

As stated in said departmental decision of June 21, 1899, section 1 of the act of June 27, 1890, should be read and construed in *pari materia* with section 4707, as amended by other acts, the same as if the *wo*, with other amendments of said section, comprised but one section bearing date of June 27, 1890, when applied to dependent parents' claims filed subsequent to that date, thus eliminating from section 4707 such portion as is repugnant to the last act. The portion thus eliminated would be that portion of section 4707 as required proof of dependence on the soldier at the date of his death and subsequent thereto and up to the time of filing application.

Immaterial testimony alone can never be the basis of a pension claim, and, as proof of dependence prior to filing a dependent parent's claim subsequent to June 27, 1890, is immaterial, irrelevant, and mere surplusage, there remains no basis for a dependent parent's claim under section 4707, as it existed prior to June 27, 1890, and no authority for filing a claim under the unamended section subsequent to June 27, 1890, or for permitting claimants to encumber the record with useless testimony which, when filed, avails them nothing. So, too, it is unjust and misleading to claimants to impose upon them the unnecessary expense of procuring and filing testimony which the law does not require and which in no manner tends to establish their right to pension where it falls short of proof of present dependence.

Claimants should be advised that all dependent parents' claims should be filed under section 4707, as amended by the act of June 27, 1890 (except in the case of insane parents), and that their proofs will be required to conform to this law.

Paragraph 3, page 116, Treatise on the Practice of the Pension Bureau, is hereby amended so as to read as follows:

Pensions for dependent parents are rated in accordance with the provisions of section 4707, as amended by the act of March 19, 1886.

The case of Mary Ann Hurst (9 P. D., 406), to which you call my attention, is hereby overruled, and any other decision in conflict with the case of Elizabeth Darling, mother of Franklin Rickard (10 P. D., 244), decided June 21, 1899, will not be regarded as authority in future.

The papers in the case accompanying your communication are herewith returned.

MARRIAGE AND DIVORCE—EVIDENCE.

REBECCA WILEY (WIDOW).

First. Under the Maryland decisions, the same proof of cohabitation, general reputation, and acknowledgment, that will establish a marriage good at common law, will establish the presumption of a religious ceremonial marriage in that State. *Richardson v. Smith* (80 Md., 89); *Redgrave v. Redgrave* (38 Md., 97); *Jackson v. Jackson* (80 Md., 176); *S. C.* (82 Md., 17); *Barnum v. Barnum* (42 Md., 251); and *Jones v. Jones* (48 Md., 391).

Second. The evidence in this case fairly establishes a valid marriage of the claimant and soldier under the laws of Maryland, even assuming the decision of the supreme court of that State in the case of *Denison v. Denison* (35 Md., 361) to be a correct construction of the Maryland statutes.

Assistant Secretary Webster Davis to the Commissioner of Pensions, September 22, 1899.

Rebecca, widow of William Wiley, late private, Company E, Eleventh Maryland Infantry, by her attorney, appealed May 13, 1899, from the Bureau action rejecting her old law widow's claim, filed October 18, 1892, on the ground of her inability, though aided by special examination, to prove that she is the legal widow of the soldier, and that the evidence filed since the rejection of her claim, October 28, 1898, is not sufficient to warrant reopening of claim.

It is contended, in brief, that the evidence proves a valid ceremonial marriage under the laws of Maryland and the decisions of the courts in that State, citing the decisions in the cases of *Sellmon v. Bowen* (8 Gill and Johnson, 50); *Boone v. Purnell* (28 Md., 607); *Copes and Adams v. Pearse* (7 Gill, 263); *Redgrave v. Redgrave* (38 Md., 93); *Barnum v. Barnum* (42 Md., 251), and *Farnhill v. Murray* (1 Bland, 479); that under the laws of Maryland (1 Md., Code, General Laws, art. 35, sec. 2) the wife is prohibited from testifying to her marriage, as was held in *Redgrave v. Redgrave* above cited, and that marriage is permitted to be proved by general reputation, cohabitation, and acknowledgment.

Soldier enlisted May 23, 1864, and was honorably discharged with his company September 28, 1864. He died December 17, 1866, without having filed a claim for pension, and the evidence tends to show that the cause of his death was consumption. Both soldier and claimant had been previously married. Claimant's first husband died May 15, 1856, and soldier's first wife died prior to his alleged marriage to claimant.

Claimant alleged in her application that she was married to soldier in Baltimore, Md., March 10, 1857.

The only question to be considered in this appeal is whether the evidence establishes the fact that claimant was married to soldier.

Rev. John W. Hedges, aged 79, testified, in an affidavit August 19, 1897, that he was the—

pastor of Jefferson Street M. E. Church, Baltimore, Md., in the year 1857, and united in the bonds of holy wedlock William Wiley and Mrs. Rebecca Sprowl, about the month of March, at the beginning of my pastorate of said church; memorandas nor memory will not serve me any more minutely as to exact date of month.

Before the special examiner he testified, April 25, 1898, that he was pastor of said church in 1857 and 1858; that he married Rebecca Sprowl to William Wiley at the parsonage, one door south of the Jefferson Street M. E. Church, Baltimore, Md., as stated in his affidavit; that he could not tell whether he made a return of the license or not; that he would not have married them without the license; that he does not remember any persons who were present except Mrs. Hedges, who is dead; that he had no record of this marriage; that he certainly had some information on the subject when he made his affidavit; that he could not safely say whether he did or did not get a letter from the claimant or her agent refreshing his memory at the time he made that affidavit; that he had no present recollection that he did perform that marriage ceremony; that it was his uniform practice to make a return of all licenses; that he was the pastor of said church in March, 1857, that being the beginning of his pastorate of that church.

Joseph A. Kraft, aged 64 years, testified, in an affidavit July 30, 1897, that he was well acquainted with William Wiley from the latter part of 1855 to the time of his death; that Wiley came to Baltimore about that time, and they were both employed by an omnibus company as drivers, and remained with the company several years and became fast friends; that he remembers clearly when Wiley was married to Mrs. Rebecca Sprowl about the fore part of March, 1859, and that he saw them married; that Wiley told him they were going to be married and asked him to drive the carriage from the house near Baltimore Cemetery, where Mrs. Sprowl lived and where Wiley boarded, to the minister's house, and while they were in there he remained to watch the horses and looked through the window and saw them standing and the minister reading from a book; that they joined hands and were married; that he remembers joking with them on the way back; that years have passed, and he never charged his memory with the occurrence and could not then remember the name of the minister or the street it was on, but it was near Jefferson or Bond street, and that he thought the minister was from Jefferson Street Church.

The special examiners reported that this witness's reputation for veracity and credibility was good.

Rev. Howard F. Downs, pastor of said Jefferson Street M. E. Church, testified before the special examiner March 10, 1898, as follows:

I have made a close examination of the records of said church relating to marriages and do not find any record of the marriage of William Wiley and Rebecca Sprowl, having examined the several records from 1854 to 1858. Elisha D. Owen was the first pastor of this church, and the second was John W. Hedges. In looking over the records during the pastorate of John W. Hedges I find there are some probable omissions in recording marriages, as blank spaces are left in the record in two different places, as if it was the intention to record therein a marriage, and in one instance in the record of 1857 is recorded a marriage which took place in 1856, and marked "omitted," showing delay or probable carelessness in keeping the record.

The testimony further shows that from the date of said alleged ceremonial marriage to the date of soldier's death, with the excep-

tion of the time soldier was absent from his home while in the service, they lived and cohabited in Baltimore, Md., as husband and wife and were so regarded by their friends, relatives, acquaintances, and neighbors; that claimant with others executed a deed in 1872 as "Rebecca Wiley, formerly widow of James Sprole;" that she participated in the distribution of the estate of her brother, William Powell, deceased, as Rebecca Wiley in 1867; that William George Wiley was baptized by the rector of St. Luke's Church, Baltimore, Md., March 2, 1862, as the child of William and Rebecca Wiley, born January 18, 1860; that Henry, born January 1, 1866, Mary E., born May 26, 1857, and Ida V. (called Jennie), born October 12, 1863, were baptized by the pastor of the Union M. E. Church, West Lombard street, Baltimore, as the children of William and Rebecca Wiley; that all of these children were recognized by soldier and claimant and their relatives and acquaintances as the children of said soldier and claimant, and that there had never been a suspicion or intimation questioning the legitimacy of said children, or the marriage of their parents, by their friends, relatives, acquaintances, or neighbors; that claimant's first husband, James Sprole, died May 15, 1856, as the result of an accident, and was buried in lot 49, Section R, in Baltimore Cemetery; that Harry Wiley, who died of brain fever at the age of 4 months, was buried in the same lot 49, May 8, 1866; that William Wiley, the soldier, died of consumption at the age of 46, and was buried in said lot 49, December 19, 1866, and that William Wiley, aged 37, the son of claimant, died of apoplexy, and was buried in said lot 49, February 8, 1897.

An adverse presumption appears to have been raised by the special examiner who examined claimant January 15, 1897, based on the facts that there were no official records showing the alleged marriage or the issuance of a license, and that claimant gave the name of "Owens" as the officiating clergyman and the place of marriage as St. John's Church, Baltimore, Md.

In view of the fact that there is no evidence that any record of the issuance of a license was kept by the city of Baltimore at that time, probably the officials relying upon the return of the certificate of the officiating clergyman as evidence of the issuance of the licenses and the performance of the marriage ceremony, and in view of the further fact that claimant's memory was admittedly very poor and her age 77 years, and that Rev. Mr. E. D. Owens was the name of the clergyman who immediately preceded Rev. Mr. Hedges, I do not regard these facts as very important. Claimant testified that it seemed to her his name was something like "Owens," but she could not state whether that was his name or not, but thought he must have been a Methodist minister; that she was lawfully married to William Wiley by a minister under regular ceremony, but she can not remember his name; that her husband, Mr. Wiley, made all the arrangements for the marriage, but she was unable to recall whether she was married in the church or in the parsonage. This special examiner reported claimant as an honest appearing woman; that she had a good reputation.

The first special examiner who examined claimant, August 11, 1896, reported her reputation good and recommended admission of the claim.

In the Bureau action of April 27, 1899, a reference is made on the face of the brief to the action of the law division, a reference to which shows that the chief of the division on October 24, 1898, reported as follows:

After a careful examination of the cases cited by Attorney Staley, of Baltimore, Md., I am of the opinion that, notwithstanding that they show that the courts of Maryland have held that proof as to general reputation is admissible to show marriage, the courts unquestionably intended to restrict such evidence to proof of marriage itself, and that such proof must be to the effect that the marriage was duly and legally contracted according to the law of the place or country in which it occurred. Therefore, inasmuch as the marriages in the case cited were contracted and consummated in other States and not under the laws of Maryland, it is apparent that while this claimant was in a position to contract a lawful marriage with the soldier in 1857, it is not shown that such a celebration of marriage took place as could be considered lawful and legal under the laws of the State of Maryland. Hence I must conclude that these citations are not applicable to her case.

The Maryland statutes of 1777, section 3, provides that—

The rites of marriage between any white persons, subjects, or inhabitants of this State shall not be celebrated by any person within this State unless by ministers, * * * and if any person shall celebrate the rites of marriage between any white persons, as aforesaid, contrary to the true intent and meaning hereof, he shall forfeit and pay for every offence five hundred pounds, current money.

Section 5 of said act provides that—

No person within this State shall marry without a license * * * under a penalty of five hundred pounds, * * * and if any minister shall marry any person without such license or publication, as aforesaid, he shall also forfeit five hundred pounds. (See 1 Kilty, 445, 446.)

It was held under this statute in the case of *Denison v. Denison* (35 Md., 361) that some religious ceremony is necessary to perfect a marriage in that State, and that no lawful marriage can be contracted merely per verba de presenti or per verba de futuro cum copula.

There is no provision in the statutes of Maryland which contains any positive declaration that marriages not celebrated in the manner prescribed by the statute shall be void. In construing the Maryland statute, which by act of Congress approved February 27, 1801 (2 Stat. L., 103), were continued in force in that part of the District of Columbia ceded by Maryland to the United States, as applied to marriages in said District, it was held in the case of *Annie Higgins* (10 P. D., 110) that a marriage per verba de presenti was valid at common law, and is valid in the District of Columbia, citing *Thomas v. Holtzman* (18 D. C., 62); *Meister v. Moore* (96 U. S., 76).

In the case of *Maria McCarthy* (10 P. D., 118), involving the same question of construction of the Maryland statutes on marriage, it was held that said statute was directory, and as it contained no express clause of nullity, a marriage valid at common law was valid under said statute in the District of Columbia, citing 2 Greenleaf on Evidence,

paragraph 460; *Meister v. Moore* (96 U. S., 76); *Parton v. Henry* (1 Gray, Mass., 119); *Bishop on Marriage and Divorce*, section 283 et seq.; *Reeves on Domestic Relations* (99, 200); 2 Kent Com. (90, 91); *Hutchins v. Kimmel* (31 Mich., 126), and *Proctor v. Bigelow* (38 Mich., 282).

Even in Maryland and under the *Denison* decision (35 Md., 36) the fact of a ceremony is not required to be strictly proved, evidence of general reputation merely from which marriage may be inferred being sufficient, except in cases of adultery or bigamy, in which only strict proof is required, as was held in the *Higgins Case* (10 P. D., 110), citing *Jackson v. Jackson* (80 Md., 176; 82 Md., 17); *Boone v. Purnell* (28 Md., 607); *Redgrave v. Redgrave* (38 Md., 97); *Jones v. Jones* (45 Md., 159 and 48 Md., 391).

The court of appeals of Maryland in the recent case of *Richardson v. Smith* (80 Md., 189) decided November 22, 1894, that—

In this State there can not be a valid marriage without a religious ceremony; but a marriage may be competently proved without the testimony of witnesses who were present at the ceremony. It would work a cruel injustice in many instances if the law were otherwise. The witnesses might be dead, and competent written evidence of the ceremony might be unattainable. It would not follow, however, that the union between the parties would be considered illicit and the children illegitimate. The law has wisely provided that marriage may be proved by general reputation, cohabitation, and acknowledgment. When these exist, it will be inferred that a religious ceremony has taken place, and this proof will not be invalidated because evidence can not be obtained of the time, place, and manner of the celebration of the marriage. On this point we think it unnecessary to do more than quote from *Rodgrave v. Rodgrave* (38 Md., 97): "Where parties live together ostensibly as man and wife, demeaning themselves toward each other as such and are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married. *Taylor's Ev.*, sec. 140, 517, *Hervey v. Hervey* (2 W. Bl., 877); *Goodman v. Goodman* (28 L. J., ch. 1); *Jewell v. Jewel* (1 Howard, U. S., 219, 232). Indeed, the most usual way of proving marriage, except in actions for bigamy, is by general reputation, cohabitation, and acknowledgment. *Sellman v. Bowen* (8 Gill v. John., 50); *Boone v. Purnell* (28 Md., 607)."

In the case of *Jackson v. Jackson* (80 Md., 176) the said Maryland court held that marriage may be proven in the State of Maryland by general reputation, cohabitation, and acknowledgment in all cases, except actions for criminal conversation and prosecution for bigamy; that by the law of Maryland a valid marriage can not exist unless it is celebrated by a religious ceremony; that it was not required that the marriage should be proved by witnesses who were present at the time, but such facts must be proved as in the contemplation of the law will justify the inference that a religious ceremony has been performed, and that the declarations of deceased parents are admitted as evidence to prove the legitimacy of their children, citing *Crawford v. Blackman* (17 Md., 49); *Boone v. Purnell* (28 Md., 607); *Copes v. Pearce* (7 Gill, 247); *Redgrave v. Redgrave* (38 Md., 97); and *Taylor on Evidence*, section 517.

While the *Jackson Case* (8 Md., 176) involved the validity of a Penn-

sylvania marriage, yet the Maryland court held that it could not take judicial notice of the laws of another State, and in absence of evidence as to that law no instruction concerning the same should have been granted. The result of this holding was therefore the same in that case as if the marriage had been alleged to have taken place in Maryland.

The Jackson Case was again before said court November 15, 1895 (82 Md., 17), when the previous holdings of the court were reaffirmed, and the court referred to the two exceptions to the general rule that a marriage valid where consummated is valid everywhere, viz: First, marriages which are deemed contrary to the law of nature as generally recognized in Christian countries, which involve polygamy and incest; second, marriages which the local law-making power has declared shall not be allowed any validity.

In *Barnum v. Barnum* (42 Md., 251), the court after referring to the maxim that "the law always presumes in favor of legitimacy," and that where the proof shows the existence of continued cohabitation of the parties for several years, as man and wife, the presumption is always indulged that the cohabitation is legal rather than otherwise; that if parties live together ostensibly as man and wife, demeaning themselves toward each other as such, and especially if they are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married; citing *Redgrave v. Redgrave* (38 Md., 97) and *Cunningham v. Cunningham* (2 Dow, 482), proceeded as follows:

But unfortunately the facts to which we have referred are confronted with such an array of countervailing evidence that to maintain the existence of the marriage is rendered utterly impossible. It is perfectly clear, and not contended to be otherwise, that an illicit connection between the parties commenced and continued for some time in North Carolina before they removed to Arkansas. It was while this illicit connection existed that Dr. Barnum left North Carolina, taking Caroline Butler with him, she then being pregnant with child. They left North Carolina in 1837, and their illicit connection and cohabitation continued without intermission after their arrival in Arkansas. This being so it is incumbent upon those who set up a subsequent marriage between the parties to show when and where it occurred. It is affirmed and attempted to be shown that the parties were subsequently married in 1838 or 1839 at the village of Manchester Bluff, Clark County, Ark., and that the marriage celebration took place before and in the office of one Edmonson or Edminson, a justice of the peace. Having thus fixed upon the time and place and assumed to prove that a valid marriage was then and there celebrated and at no other place, if the evidence should be insufficient to establish such a marriage, thus assumed to be proved, the parties can not be permitted to rely upon other facts and circumstances as the ground of presumption that a marriage may have taken place between the parties at some other and different time and place from that testified to by the witnesses, the presumption in such a case being that the connection between the parties continued to be illicit until that presumption is overcome by distinct proof of marriage. *Blackburn v. Crawford* (3 Wall., 175).

Marriage may doubtless be proved in civil cases other than actions for seduction—by reputation, declarations, and conduct of the parties but—where reputation is

relied on, that reputation, to raise the presumption of marriage, must be founded on general and not divided or singular opinion, and where reputation in such a case is divided it amounts to no evidence at all.

In *Jones v. Jones* (45 Md., 144) it was held that—

Intercourse proved to have been illicit in commencement will be presumed to continue so, and evidence other than cohabitation will be necessary to establish a marriage, but any facts or circumstances tending to show a change from the unlawful to the lawful relation of the parties may go to the jury as evidence upon which to found a presumption of marriage, though not amounting to direct proof.

In the same case (48 Md., 391) the court held, March 26, 1878, that—

The general doctrine is that if parties live together as man and wife, demeaning themselves toward each other as such, and especially if they are received into society and treated by their friends and relations as having been entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married. But in such cases a legal marriage is only presumed from general repute and habit, and that presumption has its limit and may be overcome in particular cases by counter evidence or counter presumption.

From the foregoing decisions of the court of appeals of Maryland it appears that the same proof which will establish a marriage valid at common law, without a religious ceremony, in States where the validity of such marriages is conceded, will establish the presumption of a religious ceremonial marriage in the State of Maryland.

The holding of the court in the *Barnum Case* (42 Md., 251) that, a certain time and place having been alleged, it must be proved, and that the evidence of general reputation, cohabitation, and acknowledgment is not sufficient to establish presumption of marriage at some other time and place, is another form of stating the general rule applicable to pleadings and proof, viz: that a material variance between the proof and pleading is fatal. (See *Variance*, 28 Am. and Eng. Ency. of Law, 49.)

While, therefore, claimant alleged in her declaration that she was married by "Rev. Owens, at Baltimore," and in her testimony stated that she thought his name was Owens and the church or parsonage where she was married was St. John's, whereas the evidence offered is to the effect that the clergyman's name was Hedges and the parsonage where the service was performed was that of the Jefferson street M. E. Church, Baltimore, Md., I do not think the strict rules of common-law pleadings should be applied, and her claim rejected because of variance between her allegation and proof, and which variance can in the courts generally be cured by an amendment of the pleadings so as to conform to the proofs.

As I stated in instructions (9 P. D., 93),

After a careful examination of the various enactments of law that go to make up the pension system, I can not think it was the intention of Congress to hedge their administration with the difficulties and pitfalls of any system of special pleading, the technicalities and refinements of which may tend to a practical defeat of the benevolent aid intended to be extended to the soldiers of the Republic.

The pension law is essentially a law *sui generis*; and while a proceeding had there-

under, when not expressly regulated by statute, may draw to itself the aid of certain canons of law and rules of evidence, yet the very nature of cases arising under this law forbids that strictness and technicality that attend upon regular court proceedings.

Here, the will of the legislature being ascertained, the attendant proceedings should be as simple as possible. A multitude of rules tends to confusion; and the way of the claimant should not be hedged about with any difficulty that can be avoided.

The adverse facts in this case are, that at the time of said alleged ceremonial marriage claimant was pregnant with child by said soldier and that she delayed her application for pension for nearly twenty-six years after the death of soldier, although her delay may be accounted for from her reluctance to make public the fact that she cohabited with soldier prior to marriage, until forced by age and poverty to make the application. Her pastor and her physician both testify in 1897 to her extreme poverty and that her case is one that appeals strongly for and deserves special attention.

I am of the opinion that, first, under the Maryland decisions, the same proof of cohabitation, general reputation, and acknowledgment that will establish a marriage good at common law will establish the presumption of a religious ceremonial marriage in that State. *Richardson v. Smith* (80 Md., 89); *Redgrave v. Redgrave* (38 Md., 97); *Jackson v. Jackson* (80 Md., 176); *S. C.* (82 Md., 17); *Barnum v. Barnum* (42 Md., 251), and *Jones v. Jones* (48 Md., 391); second, the evidence in this case fairly establishes a valid marriage of the claimant and soldier under the laws of Maryland, even assuming the decision of the supreme court of that State in the case of *Denison v. Denison* (35 Md., 361) to be a correct construction of the Maryland statutes, and the action rejecting her claim on the ground stated is accordingly reversed.

The question as to whether soldier's death in 1866 was due to his military service, from which he was discharged in 1864, is not involved in this appeal and is not passed upon.

The papers in the case are herewith returned.

MARRIAGE AND DIVORCE—EVIDENCE.

ANNA MARIA GALLICH.

A divorce is never presumed, except it be for the purpose of upholding a subsequent marriage, such marriage having been proved to be an established fact.

The mere fact that one lived with another man or woman in a marital state, or that there was a subsequent ceremonial marriage, is not sufficient to warrant a presumption of divorce. There must be other substantial facts in connection therewith before such a presumption can be successfully invoked.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
September 22, 1899.*

Anna Maria, as widow of Francis Gallich, formerly a private in the United States Marine Corps, in the Mexican war, filed her application

under the act of January 29, 1887, on November 9, 1895, claim being rejected on the ground that claimant was not the widow of the sailor in question. An appeal filed on March 24, 1898, contends that rejection is contrary to law and fact.

The facts in this case are as follows: The claimant herein was married to the sailor by ceremony by Rev. Otto Borgess, pastor of Holy Trinity Church, Philadelphia, Pa., on November 24, 1844. This fact is proved by a certified copy of the church record on file herein. Sailor enlisted in the United States Marine Corps on November 19, 1845, served in and through the Mexican war, and was discharged on the Pacific station on November 18, 1849. He did not return to his home, but was in correspondence with his wife as late as 1853, his letters being in evidence, and being couched in affectionate terms, as well as showing the existence of the marriage tie. He was on said last-mentioned date in the gold diggings in California.

The claimant states that she received no more tidings from him until she filed a claim as his widow, when she was informed that her husband was alive, and living in the Republic of Guatemala, he having filed a claim as a Mexican war survivor, which claim appears to have been approved for admission on April 10, 1888.

The consul-general for Guatemala, being cognizant of the fact that sailor was a pensioner, notified the Commissioner of Pensions that said sailor died in said Republic on March 14, 1895, as will be seen hereafter. There is also on file in this case affidavits from claimant and her immediate relatives to the effect that claimant was never divorced from sailor, and an affidavit from the prothonotary of the court of common pleas, Philadelphia, Pa., to the effect that the records of his court fail to show any such divorce. Claimant appears to have spent all her life since her marriage in and about Philadelphia.

As the correspondence of the consul-general has an important bearing upon the issue herein, the following copy of letters and documents are set forth:

EXHIBIT 1.

U. S. GENERAL CONSULATE,
Guatemala, September 26, 1895.

JOHN TURBOT, Esq.,
2025 Hancock St., Philadelphia, Pa.

SIR: I beg leave to acknowledge your letter of Sept. 7, in which you ask for information relative to Frank Galich. Mr. Galich died several months ago in this city. Knowing that he was pensioned, I at once notified the Commissioner of Pensions. A few days after his death a woman presented herself at this office, claiming to be his wife, and made inquiry after his pension. I referred her to the Commissioner of Pensions in Washington.

If I can give any assistance to you in this matter, please call on me.

I am, sir, yours, truly,

D. LYNCH PRINGLE,
Consul-General.

EXHIBIT 2.

O. W. and N. Div.

J. G. J.

Mex. Wid. 9518.

Anna Maria Gallich,

wid. of Francis Gallich.

DEPARTMENT OF THE INTERIOR,
BUREAU OF PENSIONS, *Washington, D. C., June 17, 1896.*

SIR: I have the honor to advise you that Anna Maria Gallich, of Philadelphia, Pennsylvania, is an applicant for pension as the widow of Francis Gallech, deceased, who was a pensioner under certificate No. 14761, for service rendered in the Mexican war.

The widow files a certificate of her marriage to the soldier on the 24th of November, 1844, at Philadelphia, Pennsylvania, and, from his letters on file with the claim, the soldier seems to have recognized the marriage relation as late as the year 1853, when he deserted his wife, and some time prior to 1887, when he applied for pension, became a resident of Guatemala.

In your letter to John Turbott, esq., of Philadelphia, Pa., dated September 26, 1895, on file with the claim, you announce the death of the soldier, and state that a few days after his death "a woman presented herself at your office, claiming to be his wife, and made inquiry as to his pension."

On the 9th of December, 1893, the then U. S. consul-general at Guatemala furnished the soldier a certified copy from the Miscellaneous Record Book of the consulate, to wit: "Francis Gallich, a naturalized citizen of the United States, and who served four years in the U. S. Marine Corps during the Mexican war, from 1845 till the fall of 1849, now a resident of Guatemala, *unmarried*, having been vouched for to me as aforesaid, I hereby register him as an American citizen, and record the following description of his person:"

(Signed)

JAMES R. HOSMER,
U. S. Consul-General.

Following the personal description, the record continues: "Francisca Gallich, born October 11, 1880; Luis Gallich, born October 9, 1884; children of Francis Gallich, above described."

There is, also, on file with the claim, a certificate from the chief of the civil registry, Guatemala, to wit: "That in the book of deaths, No. 25, there is an entry, No. 844, which reads: 'In Guatemala, the 14th of March, 1895, appeared Don Nazario Rivera, and he declared that in house of the old parish, yesterday, at six o'clock, died, without leaving a will, of dysentery, Francisco Gallich, 61 years old, *married* with Francisca Gallich, 61 years old, married with Francisca N., Catholic by religion, merchant, captain, of German origin, and resided in this city,'" etc.

The prothonotary of the courts of common pleas of Philadelphia, Pa., certifies that there is no "record of divorce proceedings between Anna Maria Gallich and Francis Gallich from 1845 to date," and parties in Philadelphia who knew them as man and wife prior to his desertion, and have known the wife intimately ever since, swear that they lived peaceably while together, and that they have no knowledge of, and never heard of, any proceedings in divorce.

In view of the facts above related, I respectfully request that you will ascertain, from proper sources, and advise this Bureau of the true relation existing between Francis Gallich and Francisca N., as above set forth; and particularly whether there is any record of their marriage, and any proceedings of record, in Guatemala, by which the marriage, if any, was or may be considered as legalized.

Very respectfully,

Commissioner.

The Honorable D. LYNCH PRINGLE,
U. S. Consul-General, Guatemala.

EXHIBIT 3.

U. S. CONSULATE-GENERAL,
Guatemala, Aug. 11, 1896.

To the COMMISSIONER OF PENSIONS,

Department of the Interior, Bureau of Pensions, Washington, D. C.

SIR: With reference to your letter of June 17th, which refers to the claim of Anna Marie Gallich, widow of Francis Gallich, who died in this city some time back.

Although it is a notorious fact, Francis Gallich was married twice here, still there exists no legal proof or record of either marriage.

The only record of having been married is that which is shown in the record of death, copy of which is on file in Philadelphia. I enclose copy.

The civil register only goes back as far as 1877. It might be possible to procure proof of these marriages through the presence and knowledge of individuals by affidavit. His first wife was the daughter of the celebrated President Carera.

I do not know who his second wife was, but it could be ascertained. All these points, however, would cause some trouble and expense, and I think the claimants should expect to pay a lawyer to obtain them, if required.

I am, yours truly,

D. LYNCH PRINGLE, *Consul-General.*

P. S.—Since writing the above the said Francisca N., the woman who claims to have been married to Mr. Gallich about 17 years ago, has been in to see me and informs me that she was totally ignorant of the fact that he had an American wife. She was married in a village in this Republic and says she will produce the proof of the marriage, which will be forwarded.

EXHIBIT 4.

UNITED STATES CONSULATE-GENERAL,
Guatemala, July 10th, 1897.

JOHN TURBOTT, Esq.,
2025 N. Hancock St., Phil.

SIR: I beg leave to acknowledge receipt of your letter of June 25, which refers to the claim of the widow of Francis or Frantz Gallich.

This whole matter has been investigated and reported upon by me twice, and I think that you can get the information you desire by applying to the Commissioner of Pensions, to whom I sent the certificate of death.

There is absolutely no record of there having been any divorce obtained by Gallich from his wife. In fact no divorce existed according to the laws of this Republic until quite a short time ago.

Gallich regularly married the first time the daughter of the celebrated Pres. Carera. She died and he married the woman with whom he was living at the time of his death.

She tells me that she has all her papers regularly registered, and said that she intended to bring them here to-morrow to prove that she was regularly married, but she has failed to do so up to the present time.

It would seem to me that Anna Marie Gallich is lawfully and legally entitled to the pension; this is, however, only a matter of opinion.

I am yours, truly,

D. LYNCH PRINGLE, *Consul-General.*

There is a seal which reads:

REPUBLIC OF GUATEMALA,
25c.
1895.

No. 381284.

The chief of the civil registry.

CERTIFIES

That in the book of deaths, No. 25, there is an entry—No. 844—which reads: "In Guatemala, the 14th of March of 1895, appeared Don Nazario Rivera, and he declared

that in a house of the old parish yesterday at six o'clock died, without leaving a will, of dysentery, Francisco Gallich, 61 years old, married with Francisca N., Catholic by religion, merchant, captain, of German origin, and resided in this city, being the son of a person of the same name as himself and of Catherine N." He ratified what has been said after it was read to him, and he did sign it.

Attested by J. Cupertine Aragon, Lazaro Valdez, chief of the civil registry, Manuel Rojas M.

At the request of interested parties I write the present in Guatemala this 19th day of November, 1895.

MANUEL ROJAS M.

There is a rubber stamp which reads:
Civil registry, Guatemala. Duties, 753c.

The undersigned, Spanish consul in the city of Philadelphia, certifies that the above is a true translation from the Spanish that has been exhibited to him for such purpose, and for which no duties have been charged.

Philadelphia, Dec. 9th, 1895.

[SEAL.]

JOSÉ CONGOSTO,
Consul for Spain.

EXHIBIT 5.

CONSULATE-GENERAL OF THE UNITED STATES, GUATEMALA, CENTRAL AMERICA.

Guatemala City, September 12, 1887.

Francis Galich, a naturalized citizen of the United States, and who served four years in the U. S. Marine Corps during the Mexican war, from 1845 till the fall of 1849, now a resident of Guatemala, unmarried, having been vouched for to me as aforesaid, I hereby register him as an American citizen, and record the following description of his person:

(Signed)

JAMES R. HOSMER,
U. S. Consul-General.

Age, 63 years; stature, 6 ft. 2 in.; forehead, high; eyes, brown; nose, large; mouth, moustache; chin, broad; hair, gray; complexion, fair.

Signature:

(Signed)

FRANCIS GALICH.

Francisca Galich, born October 11, 1880, Luis Galich, born October 9, 1884, children of Francis Galich above described.

(Signed)

JAMES R. HOSMER,
U. S. Consul-General.

CONSULATE-GENERAL OF THE UNITED STATES, *at Guatemala.*

I hereby certify that the above is a true copy of the record found on page 78 of the sole miscellaneous record book of this consulate, and is given by me to Francis Galich this 9th day of December, A. D. 1893, to aid him in securing the repayment of his Mexican war pension.

[SEAL.]

HENRY C. STUART,
U. S. Consul-General.

Free.

c/o Consul-Gen., Guatemala.

EXHIBIT 6.

LEGATION OF THE UNITED STATES OF AMERICA IN CENTRAL AMERICA.

Guatemala, Dec. 13, 1893.

From the papers which he has and from his own account of himself I am assured that the applicant, Francis Galich, is a citizen of the United States and is entitled to a pension.

[Seal of the legation.]

P. M. B. YOUNG,
U. S. Minister.

The specific ground of rejection is as follows:

Claimant widow of soldier, Francis Galich, private, United States Marine Corps.

Respectfully referred * * * with the opinion that claimant has not satisfactorily shown that she is the legal widow of the marine and that her claim should be rejected.

By reason of the long separation and absence of the husband of nearly or quite fifty years, and remarriage on his part, divorce must be presumed, and it falls upon claimant to show that there was no divorce, which she failed to do.

The issue in this case is simple, being wholly one of law, according to facts in evidence.

The marriage of claimant and sailor has been proved by not only the best evidence that the case is susceptible of, but by the very highest class of evidence. This marriage is a matter of record, and a transcript of said record is on file. Moreover, the letters hereinbefore referred to show conclusively that the sailor recognized this marriage relation; and, further, you admit this marriage as a legal one. Now, this marriage being an accepted fact, it is of continued binding and full force until another status is shown, and nothing but the death of one of the parties or a divorce granted by a court of competent jurisdiction can break the tie and render a subsequent marriage valid. Death did not intervene in this case, and the sole reason on which you hold this marriage sundered is found in the words previously quoted, viz:

By reason of the long separation and absence of the husband of nearly or quite fifty years, and remarriage on his part, divorce must be presumed.

Now, it may be stated as a sound legal proposition and without fear of successful refutation that never in the history of trials where marriage is the issue has it been held solely upon the showing that there has been a separation of fifty or of any number of years that a divorce will be presumed. The contention to the opposite effect is clearly unsound, and I have never before heard of such a proposition being urged.

I admit that under certain circumstances, one of such circumstances invariably being that one of the parties is shown to have actually remarried, a divorce is sometimes, although very rarely, presumed. But I have failed to find, after extended research, that a divorce will be ever presumed except it be for the purpose of upholding a subsequent marriage, such subsequent marriage being the direct and not the collateral issue. Now, it is first to be noted, as to this, that the question of a subsequent marriage of sailor is not the direct issue in this case. There is no contesting widow here. But suppose the validity of a subsequent marriage was the direct issue, and suppose also there was a contesting claimant, what would be the first thing to be established? Clearly it would be that a subsequent marriage had actually been accomplished. What is the proof thereof in this case? Nothing—absolutely nothing—but the statement in the book of death, as shown by the certificate of the chief of the city registry in Guatemala among other statements, that sailor was “married with Francisca N.”

This Francisca N. called upon the consul-general in August, 1896, stating that she had been married to sailor for some seventeen years. This would make the date of her purported marriage somewhere in 1879, and yet eight years from that date, viz, on September 12, 1887, the consul-general registered this sailor as an unmarried American citizen, such registration being the outcome of statements by the sailor and by those who vouch for him. Although Francisca stated that she would substantiate her allegations as to being the wife of sailor she has wholly failed to do so. In fact, she has never endeavored to make any such proof.

It is pertinent to ask at this juncture that if this Francisca should file a claim as the widow of the soldier would you admit that she was the sailor's widow? Would you consider that she had established her right as widow under the evidence recited? I think not, and yet under your holding in this case you would be obliged to do so in order to be consistent, for you hold that claimant herein has no right, because of a remarriage on the sailor's part, and no one appears to claim any such rights outside of claimant save this same Francisca.

There is no proof or claim that sailor was ever married by ceremony to Francisca or to any other person save claimant, neither is there any evidence to the effect that a marital tie ever existed between sailor and any woman save claimant, except the statement of Francisca to the consul-general and the consul-general's statement that it was "notorious" that sailor had been twice married in Guatemala. In this connection it may be said that the word "marriage" has two distinct significations in common parlance. It means, first, that two parties of a different sex are living together in a matrimonial relation, while the other meaning is to the effect that they are so living by reason of a legal union. It is not to be supposed for a moment that because it was notorious that the sailor had been twice married in Guatemala that the consul-general intended to convey the impression that he had been twice married in a legal manner. It needs no further discussion to show that there is an absolute lack of proof or of even evidence that sailor ever had a legal wife other than claimant.

Sometimes, although rarely as heretofore stated, a divorce will be presumed. In such cases, however, the reason for such presumption is not that the rights of a former legitimate wife may be cut off, but that one who has shown herself as being a wife in fact may be held to be so in law, in order that marital rights may be decreed to the one whom the facts in evidence show clearly entitled to such rights. Neither this Francisca nor any other woman, save claimant, is entitled to any rights as the widow of sailor, and the evidence fails to show that anyone but claimant claims any such right.

Mr. Stewart, in his work on marriage and divorce, well states the proposition:

The presumption of innocence sometimes gives rise to a presumption of marriage. A man and woman cohabiting without being married are guilty of fornication; so

when such cohabitation is under color and claim of marriage, a marriage is often presumed, but such presumption is to save the innocence of the parties, and will not arise if it will involve or leave one of them in guilt, as if a man is cohabiting with two women, or if one of the parties is proved to be married to someone else. So sometimes if a second marriage is proved a previous divorce of the first one will be presumed; but in general a divorce can be proved only by the record. (Stewart on Mar. and Div., section 126.)

The States of Texas, Iowa, and Indiana are probably the only States of our Union in which the doctrine prevails to any extent that a divorce may be presumed in order to hold a second marriage good. The case of *Blanchard v. Lambert* (43 Iowa, 228) is the leading one in which such a doctrine is upheld, but the holding in that case is based upon a vastly different state of facts than are present in the one at bar. In said case one E. K. Lord married Horatio Muzgrave, and they separated in a year's time. Nine years thereafter she married I. D. Blanchard. Muzgrave was reported and supposed to have remarried, and he died in June, 1871; Blanchard died in August, 1873. The court held that a divorce between Muzgrave and his former wife, E. K. Lord, might be presumed, but added—

Under these circumstances, even if the marriage (between Blanchard and Mrs. Lord) were originally void, a subsequent marriage will be presumed to have occurred after the removal of all legal impediments by the death of Muzgrave.

thus basing their holding not upon the presumption of divorce alone, but also upon a common-law marriage springing into existence after the death of the first husband. There is no such sequence of facts in the present case, for the other party to the first marriage is still living, thus cutting off the possibility of a common-law marriage between the sailor and some other party.

It ought to be needless to say that in any case like the one under discussion the burden of proof rests upon the Government to show the validity of any purported marriage of sailor subsequent to the one he entered into with claimant. And in the present case it would be necessary for the Government to show that such subsequent marriage had been performed according to the laws of the Republic of Guatemala, and that such marriage was valid in the Republic of Guatemala, notwithstanding the fact that he had been previously married. Even upon proof as above, I very much doubt if any court in the United States would hold such a Central American marriage good without an actual divorce from the previous marriage.

This Department will not go to the length of cutting off the pensionable marital right of claimant in order to pave the way for the possible establishment of a right for one in a foreign country who has never made claim for any such right and who the evidence clearly shows lived with the sailor, if she did as a fact live with him at all in a meretricious way.

Presumptions regarding marriages are, in many cases, difficult and dangerous things to deal with. All presumptions, even those of law, are founded upon facts, and it needs no extended argument to show

that before a presumption can obtain in a given case there must be a sufficient amount of facts in evidence to warrant the invoking of the presumption. Just what facts are necessary, when marriage is the issue, before certain presumptions can obtain, have seldom been accurately laid down by any of our courts. Under the act of August 7, 1882, it is only safe to follow, if there have been adjudicated cases, the rulings of the appellate courts in the States under which the cause arises. (Fredricka Kent, 10 P. D., 211.) There can be no question as to the law upon this issue in Pennsylvania, the State in which this cause arose. If this case were before the courts in said State it would unquestionably be held that claimant was the widow of the sailor in question. (See Sarah O. Hayden, 8 P. D., 364.)

I hold, then, in this case: Claimant was legally married to the sailor. No other marriage of sailor has been shown, and no facts have been brought out whereby it could be presumed that sailor ever married again. Claimant has satisfactorily proved in a sufficient degree necessitated by the facts that there was no divorce between herself and the sailor, and there is no reason shown whereby it is necessary to presume for a moment that any divorce was needful.

In view of the peculiar grounds of rejection herein, I also hold: No divorce will be presumed in pension cases unless it be shown beyond question that the soldier or sailor through whom a pension is claimed actually contracted a subsequent marriage, the proof of such subsequent marriage being as strong as that regarding the first marriage; and then only when all the facts in the case warrant the conclusion that a divorce was actually obtained. The mere fact that one lived with any other man or woman in the marital relation, or the mere fact that there was a ceremonial subsequent marriage, is not sufficient to warrant the presumption of a divorce. There must be other substantial facts on which to base such presumption.

The rejection of this claim for cause stated was clearly erroneous. Claimant is the widow of Francis Gallich.

The action appealed from is reversed.

EVIDENCE—RECORD—CERTIFICATE OF DISABILITY.

DANIEL M. DELO.

A record made at the time of the soldier's discharge, by the surgeon who recommended his discharge, showing that the disability was incurred about the time he alleges and "whilst in the performance of his duty" is accepted as sufficient evidence of incurrence in line of duty, there being nothing in the case, after a special examination, tending to discredit such record, and no other evidence being obtainable.

Assistant Secretary Webster Davis to the Commissioner of Pensions, September 22, 1899.

The appellant, Daniel M. Delo, filed his original application for invalid pension on January 5, 1894, alleging that while in the military service

of the United States and in the line of duty, about September 1, 1862, he contracted fever, which resulted in rheumatism, affecting the left leg, knee, and hip. He subsequently alleged that about September 3, 1862, he sustained an injury of the left hip from which he had suffered more or less ever since and which affected the rheumatic trouble. His claim was rejected in December, 1897, on the ground that there had not been a ratable degree of disability from rheumatism since the date of filing, and he was unable, upon special examination, to show that the alleged injury was incurred in the line of duty in the service. From that action he appealed on March 21, 1898.

Accompanying your report upon the appeal is an advisory opinion from the medical referee to the effect that no disability from rheumatism has been shown since the date of filing, but that the appellant has had some affection of the left sciatic nerve and its branches, which is doubtless due to the injury of the left hip alleged by him.

Accepting this opinion as correct, it remains to be considered whether your Bureau was justified in holding that the alleged injury was not shown to have been incurred in the service and line of duty.

The appellant alleges that when his company received their uniforms at Camp Copeland, near Pittsburg, Pa., their other clothes were packed ready to be sent home; that he went to the barracks to get his package, which was lying in an upper berth of the sleeping quarters, and in climbing up to the berth a board gave away and he fell, striking on his left hip and bruising it badly. There was no other person present at the time. He got up and took his bundle out and put it with the other bundles and then went on the cars with his company to Harrisburg, Pa., where they stopped for about half a day, and then went on to Washington. Up to this time he had had no treatment. His hip pained him some, but he thought he would get along and be all right. In about a week, however, it became so bad, on account (as he supposed) of laying out in cold rains near Fairfax, Va., and getting wet, that he was sent to a hospital in Washington, where he remained until discharged. Captain Klotz, of his company, who was a physician, said he had the rheumatism, and that on account of the injury to the hip it had settled there.

The records of the War Department show that he was enrolled July 25, 1862, and was with his company from its organization until September 15, 1862, when he was sent to the Columbia Hospital in this city, where he remained until discharged on a surgeon's certificate of disability January 30, 1863. On the hospital records his ailments appear as "debilitas." The certificate of disability for discharge states:

I certify that I have carefully examined the said Daniel M. Delo, of Captain Klotz's company, and find him incapable of performing the duties of a soldier, because of dislocation of femur into sciatic notch, of five months' standing; happened while in the performance of his duty.

THOMAS R. CROSBY,
Surgeon, U. S. A.

The evidence furnished by the appellant and that obtained by special examination tends to show that he was sound prior to enlistment. While it is impossible to obtain the testimony of eye witnesses in regard to the circumstances of his injury the special examination developed nothing tending to discredit his statement in relation thereto. It is shown that he became disabled about the time alleged; that while in hospital he went around on crutches, with his left leg drawn up; and that "it was said he had been injured in the hip;" also that he said he had rheumatism.

Having considered all the evidence, I am of the opinion that in so far as the question of "line of duty" is concerned it should be determined in the appellant's favor, on the record made at the time of his discharge. While it may be assumed that the officer who made the record had no personal knowledge of the circumstances under which the injury was incurred and probably had no knowledge whatever on the subject except what he derived from the claimant, nevertheless, as has been repeatedly held by the Department, a record of that kind so nearly contemporaneous with the event to which it relates, made at a time when the soldier had (as may be presumed from his subsequent conduct) no thought of applying for pension, and which is not rebutted by any of the evidence developed by a special examination, is more trustworthy than much of the parol testimony upon which we are compelled to rely in adjudicating claims filed twenty-five or thirty years after the war.

The fact that the appellant, in his original declaration, attributed his disability to rheumatism, following fever, ought not to prejudice his case, as it is a well-settled rule that pension claimants should not be held to strict technical descriptions of their disabilities. (Albert G. Hurst, 14 P. D., o. s., 472; Robert Crawford, 1 P. D., 153.) His allegation of "rheumatism affecting the left leg, knee, and hip," taken in connection with his subsequent affidavit relative to the injury, which at the time of its incurrence, appeared to be of little consequence, is sufficient to cover the "affection of the left sciatic nerve and its branches," to which the medical referee says his present disability is due.

The rejection of the claim is set aside and you are respectfully requested to readjudicate it in accordance with the views herein expressed.

PRACTICE—REOPENING—ACT OF MARCH 6, 1896.

WILLIAM HEINRICHS.

The refusal to consider the widow's application for readjudication of her husband's claim in accordance with the provisions of the act of March 6, 1896, on the ground that he (the husband) had no claim for readjudication on file at the date of his death, was error.

A rejected claim may be reopened at any time, upon the filing of proper evidence for that purpose, either by the original claimant or by the person who succeeds to his rights.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
September, 22, 1899.*

William Heinrichs, formerly a soldier in Company B, First United States Reserve Corps, Missouri Home Guards, filed on July 21, 1890, an application for pension under the act of June 27, 1890, which was rejected in July, 1893, on the ground that a disability ratable under the provisions of said act was not shown. A second application filed by him on May 14, 1894, was rejected in November, 1895, on the same ground. A third application, filed December 30, 1895, was allowed in December, 1896, and pension, at the rate of \$12 per month granted to commence from the date of filing. The pensioner died on the 19th of February, 1897. On December 20, 1897, his widow filed a declaration for the purpose of securing a reconsideration of his claim and a reissue of his certificate to allow pension from the date of filing his original application, which, she claimed, he was entitled to under the provisions of the act of March 6, 1896. This declaration, or application, your Bureau refused to consider on the ground that the soldier had no claim for reconsideration on file at the time of his death. From your decision an appeal was filed on March 19, 1898, the contention of which is that—section 4718 of the United States Revised Statutes gives the widow the right to prosecute any claim and to collect any pension to which the soldier might have been entitled under the act of June 27, 1890.

Section 4718 of the Revised Statutes has been superseded by the act of March 2, 1895, which provides, among other things, that—

The accrued pension to the date of the death of any pensioner, or of any person entitled to a pension having an application therefor pending, and whether a certificate therefor shall issue prior or subsequent to the death of such person, shall, in the case of a person pensioned, or applying for pension, on account of his disabilities or service, be paid, first, to his widow. * * *

Under this law, as under section 4718 of the Revised Statutes, the widow's right to accrued pension is limited to what was claimed by the soldier. She can not set up a new claim in his behalf or enlarge or amend any claim made by him, but she is entitled to all the pension which was due him at the time of his death, or which thereafter became due, under his claim or claims. She may file evidence to complete any claim which he left pending, and if such claim be rejected by your Bureau she has the right of appeal. She has this right, also, if the claim was rejected before his death and he neglected to exercise the right. (William H. Hughes, deceased, 9 P. D., 152.) It follows as a matter of course that she may call attention to any error in the adjudication of a claim filed by him, whether such adjudication occurred before or after his death, and ask to have the same corrected. If her request is denied, she has still the right to appeal. In short, she may do anything in the furtherance of the claim or in securing a proper adjudication thereof that he could do if living.

The soldier in this case applied for and was granted a pension under

the second section of the act of June 27, 1890. It is provided by said section that "such pension shall commence from the date of filing the application in the Pension Office, * * * upon proof that the disability then existed."

It is further provided in the act of March 6, 1896—

That whenever a claim for pension under the act of June twenty-seventh, eighteen hundred and ninety, has been, or shall hereafter be, rejected, suspended, or dismissed, and a new application shall have been, or shall hereafter be, filed, and a pension has been, or shall hereafter be, allowed in such claim, such pension shall date from the time of filing the first application, provided the evidence in the case shall show a pensionable disability to have existed, or to exist, at the time of filing such first application, anything in any law or ruling of the Department to the contrary notwithstanding.

In the appealed case of Preston M. Rohn (10 P. D., 73), I held that "no formal application for the benefit of the act of March 6, 1896, is necessary in claims adjudicated subsequent to the passage of that act;" that said act "merely establishes a rule of practice under the act of June 27, 1890, and was intended to give to claimants under the latter act its full benefits without regard to technicalities in practice;" that "it enjoins the Department mandatorily to allow pension solely upon the proof and allegations made under the act of June 27, 1890;" and that "such mandate may not be disobeyed or rendered ineffective by departmental regulations."

If it was unnecessary for the soldier to make a formal application for the benefits of the act of March 6, 1896, in order to secure the application of the provisions of said act to his case the fact that he did not do so affords no valid reason for refusing to entertain the request of the widow to have the case reconsidered in connection with the provisions of that act. She is not making any new claim. She is simply asking that the claim which her husband made be adjudicated in accordance with the laws in force at the time of adjudication. I know of no reason why her request should not receive the same consideration that a similar request by the soldier would have received.

Furthermore, I am of the opinion that the widow has a right, independent of the act of March 6, 1896, to have her husband's original application reopened and reconsidered upon filing proper evidence for that purpose. As was said in the case of William H. Hughes (9 P. D., 152) "a pension claim has always been considered pending until finally allowed." There is no limitation as to the time within which a motion to reopen a rejected claim may be made—whether made by the original claimant or by the person who succeeds to his rights. (See case of Hughes, *supra*.)

For the reasons stated the action of your Bureau is reversed.

REMARRIAGE—WIDOWS—ACT JANUARY 29, 1887.

DORA V. OTIS, NOW COWLEY (WIDOW).

Claimant was pensioned as the widow of the soldier from July 16, 1890, to July 4, 1892; she remarried July 6, 1892.

Held, That her remarriage barred her further title to pension under the act of January 29, 1887, and that her name was properly dropped from the rolls.

Assistant Secretary Webster Davis to the Commissioner of Pensions, September 30, 1899.

The claimant in this case, Dora V. Cowley, formerly Dora V. Otis, widow of Charles R. Otis, late private, Company G, Sixteenth Regiment United States Infantry, Certificate No. 7524, was pensioned under the act of January 29, 1887, granting pensions to the soldiers' widows of the late Mexican war, from July 16, 1890, to July 4, 1892, when her name was dropped from the rolls by reason of remarriage.

June 29, 1897, claimant filed her declaration for restoration, alleging that not being remarried at the date of the passage of the act her subsequent remarriage does not bar her title to pension.

This claim was rejected by action of the Bureau February 17, 1898, on the ground of claimant's remarriage July 6, 1892, and therefore she has no title to restoration under any existing law.

Claimant has appealed from said last action, her attorneys contending that claimant's remarriage since January 29, 1887, is no bar to pension under the act of that date; that section 2 of said act provides that pensions granted under said act shall continue for and during the natural lives of the persons entitled thereto, and that this provision excludes all conditions on which a pension could be stopped; that claimant is alive, and hence the provisions in the act for a pension during life overcomes the prior law (section 4708, Rev. Stat.) that pension shall cease upon remarriage.

The soldier enlisted in the Mexican war March 21, 1847, and was discharged August 6, 1848. He was pensioned under Certificate No. 15065, and died July 15, 1890.

* Claimant and soldier were married July 6, 1881, and she was pensioned under the act of January 29, 1887, from July 16, 1890, to July 4, 1892; she was remarried to one Covil R. Cowley, July 6, 1892, when her name was dropped from the rolls. It is admitted that Cowley is living and that claimant was living with him as his wife at the time she filed her claim for restoration to the rolls and was not a widow.

It is an interesting question raised by this appeal on account of the language used in the statute under which the pension was allowed to claimant in the second section of the act, and it is not believed has been heretofore directly passed upon by the Department.

The act of January 29, 1887, provides in the first section, among other matters, for a pension to—

the surviving widow of such officers and enlisted men: *Provided*, That such widows have not remarried.

And in construing the proviso the Department held in the case of Hannah Wilson (Mexican war widows, 3 P. D., 283) that remarriage before January 29, 1887, of the widow of a soldier of the Mexican war bars her right to pension under the act of that date.

It is contended in the present case that, although the ruling in said Wilson case is correct, that the act in section 2 provides:

That pensions under section 1 of this act shall be " * * * payable only from and after the passage of this act, for and during the natural lives of the persons entitled thereto, or during the continuance of the disability for which the same shall be granted.

That this excludes all conditions on which a pension could be stopped and gives a pension "during the natural life" of claimant, she having a pensionable status at the time of the passage of the act.

Section 4708, Revised Statutes, provides that:

The remarriage of any widow * * * having a pension such pension shall cease.

Every act of Congress granting a pension to widows, with amendments, from the widows of soldiers of the Revolutionary war down to the act of June 27, 1890, unless it be the one under consideration, contemplates, and, as a rule, in some specific language, that there must be or has been widowhood during the time the widow is granted or receives the pension and that the pension is continued only so long as widowhood continues.

It is not believed that the act of January 29, 1887, is an exception.

It is clear from the language of the act, and so construed by the Department in the decision above cited, that if a widow of a Mexican war soldier had remarried prior to the passage of the act, even though she be again a widow by the death of the second husband, is not pensionable, the remarriage having extinguished the right or title to pension. This is not the case with some other laws by specific amendment by act of Congress.

The language used in section 2 of the act under consideration, "during the natural lives of the persons entitled thereto," etc., is admitted to be different from that in any other pension act; but it should be, as this Mexican war act is the only act that grants a pension to a widow when at any particular age, as this does at 62, and on account of disability, as this act does.

A pension when granted under the Mexican war act is granted—

during the natural lives of the persons entitled thereto, or during the continuance of the disability for which the same shall be granted.

The grant of pension in the act is to "the surviving widow" of the soldier. If she remarry she is not the surviving "widow," for she is no

longer a "widow," and section 4708, Revised Statutes, takes effect and says the pension will, from the date of the remarriage, "cease," the widow being no longer "entitled" to a pension.

While it is not so stated in so many words that a pension, under the act of January 29, 1887, to a widow continues only during "widowhood," or the "disability for which pensioned," it was evidently the intent of Congress that the act should be so construed, and that section 4708, Revised Statutes, is not repealed by implication or otherwise by virtue of the provisions of this act, so far as applicable to the same.

Finding no error in the action appealed from, the same is hereby affirmed and the papers in the case herewith returned.

DEPENDENCE—ACT JUNE 27, 1890—WIDOWS.

SALLY HODGIN (WIDOW).

Claimant, who is 72 years of age, and has no other property or income than a farm of 140 acres, worth from \$500 to \$700; two notes, one of \$50, another of \$55; two notes of \$9 each, and personal property worth \$10, is without other means of support than her daily labor, and dependent, within the meaning of the act of June 27, 1890.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
September 30, 1899.*

The claimant in this case, Sally Hodgin, widow of David M. Hodgin, late private Company H, Seventh Regiment Tennessee Volunteer Cavalry, has appealed from the action of the Bureau dropping her name from the rolls as a pensioner.

She was pensioned under the act of June 27, 1890, as the widow of said soldier, from August 16, 1890, to July 6, 1894, when her name was dropped from the rolls on the ground that she was not without other means of support than her daily labor.

Claimant has appealed from said action, contending that it was shown in evidence that the real estate owned by her was worth only \$500, and personal property about \$20; that her income was not to exceed \$50 to \$60 per annum; that she was 72 years of age and could do no work, and was shown to be without other means of support than her daily labor and dependent within the meaning of the act of June 27, 1890.

The facts of the case, as shown by the record and other evidence, are as follows:

Claimant and the soldier were married October 17, 1850, and lived together as husband and wife until the soldier's death, which occurred November 2, 1877.

The soldier enlisted September 24, 1862, and was honorably discharged August 9, 1865. He never made application for pension.

After special examination in 1894, it was determined by the Bureau that claimant was not without other means of support than her daily labor, and her name was dropped from the rolls July 6, 1894.

From the testimony taken on special examination, claimant owns the following property:

A farm of 140 acres, assessed at \$550, and worth from \$500 to \$700. Two notes, one for \$50, another for \$55, which were considered good, and two small notes for \$9 each; other personal property of the value of \$10, and her household goods and farming utensils, worth not to exceed \$100.

W. B. Ottoway, age 59, who was administrator of the soldier's estate, testified, in part, April 28, 1894:

The value of claimant's income from the rent of her farm, I would say from my best information, was from \$50 to \$75 per annum.

When the soldier died there was an indebtedness of over \$1,000, which has been paid from the effects on hand, at his death, such as stock, crops, etc. The taxes on the farm were about \$10 last year. I do not think claimant can make a comfortable living from this farm and keep it up.

I would not be willing to take the farm and board and clothe her, and pay her doctor's bills, for the rent of the farm. If she should rent the farm and the buildings, I should think she would not get over \$50 or \$60 for it, and if there was any repairing I do not think the renter could make the repairs and pay that much rent.

I do not suppose the farm is worth over \$500 or \$600 at the outside.

The testimony of T. J. Bailey, a neighbor, is about the same as that of Ottoway. And there is considerable other testimony of similar purport.

On the other hand, some of the witnesses whose depositions were taken thought the rental value of the farm was about \$100, no one placing it higher.

The special examiner read that portion of the act of June 27, 1890, referring to dependence, and that the widow must be shown to be without other means of support than her daily labor, and would ask the witnesses their opinion as to claimant being dependent. Some answered, "That she was not a pauper," that she did have some means of support; others answered that in their opinion claimant was not dependent, as she had other means of support than her daily labor.

It is not believed that this is a proper method of conducting a special examination. These farmers can not be considered as experts in construing a statute. What the Bureau and the Department want are the facts as to claimant's financial condition, the amount of property and its value, and the income of claimant.

The preponderance of the testimony in the case shows the value of the farm to be about \$600—not to exceed \$700.

The amount of cash income per annum from the farm has varied from year to year since 1890; some years it has been as low as \$20, and after payment of taxes has never exceeded \$60. Taking all the testimony and a fair statement of the annual income of claimant, including

interest on the \$123 she has loaned out, as shown by the four notes, would be \$60—that is, it has never exceeded this amount in any one year, and has often been much less; but for the year 1894, when her name was dropped, it was about \$60. The year she filed her claim, 1890, her income was about \$20.

The witnesses who testified that the rental value of the farm was \$100 gave this as their opinion, and did not give any figures. All the witnesses agree that the farm is a “poor” one.

Claimant has no other source of income except the farm and the \$123 she has loaned out.

At the time of the soldier's death he owned considerable personal property, consisting of live stock, but this was almost all sold to pay debts. Claimant now has only one cow and calf and eight pigs.

She was past 67 years of age in 1894 and is now about 73, and unable, by reason of age and infirmity, to add anything to her income by her daily labor.

After careful consideration of all the testimony in the case I am of the opinion that claimant's name should not have been dropped from the rolls, and that said action was error. The language of the statute is, “without other means of support than her daily labor.”

If a widow, by reason of age or infirmity, is unable to labor for her support, her claim for pension under the provisions of law, justly and reasonably construed, is entitled to greater consideration. She is then wholly dependent upon what income she may receive from other sources than her daily labor.

It can not be assumed that, because such a claimant has a small income from other means of support apart from the proceeds of her daily labor, she is therefore not pensionable. The law does not require that she be reduced to the condition of a pauper before she can be pensioned. It has uniformly been held that when a widow claimant is shown to be in possession of means of support which produces an income considerably in excess of the amount she would be entitled to as a pensioner, she is not pensionable under the statute.

In this case claimant's net income in 1894, when her name was dropped from the roll, did not exceed \$60 per annum, and she was unable to add to this by the proceeds of her daily labor. Under these conditions a reasonable construction of the law would continue her right to pension under the provisions of the act of June 27, 1890.

The action appealed from is therefore reversed, and you are instructed to restore her name to the pension roll from the date of dropping.

MARRIAGE—TENNESSEE—MISSOURI—EVIDENCE.

ANGELINE ADAMSON (ALLEGED WIDOW).

First. The evidence in this case fails to show any ceremonial or common-law marriage between the claimant and soldier, but shows that their relation was illicit in its inception, and continued unchanged until her desertion of soldier in 1885, eight years prior to his death.

Second. A relation illicit in its origin is presumed to so continue until a changed relation is shown, and continuous cohabitation of the parties after the removal of the legal impediment to marriage is not evidence of a change from an illicit to a matrimonial status under the laws of Tennessee or Missouri.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
September 30, 1899.*

Angeline, alleged widow of Thomas B. Adamson, deceased, late private of Company A, Sixth Missouri Volunteer Cavalry, appealed May 26, 1899, from the Bureau action of May 2, 1899, rejecting her widow's claim No. 584616, filed November 3, 1893, under the act of June 27, 1890, on the ground that she was not the widow of soldier, she being unable to establish a valid legal marriage to soldier subsequent to removal of impediment prior to their separation in 1885.

Soldier enlisted August 6, 1861, and was honorably discharged November 10, 1862. He died at Billings, Mo., October 15, 1893.

Claimant in her declaration filed November 3, 1893, alleged that she was married to soldier by Rev. Hayes, at Silver Springs, Tenn., November 18, 1866.

In an affidavit filed August 16, 1895, she testified that she and soldier were married in a boat on the Cumberland River near Nashville, Tenn., November 18, 1866, by Rev. Hayes; that she has been unable to find any marriage record in Tennessee; that she had a certificate from Rev. Hayes of their marriage, but it is lost and can not be found.

In affidavit filed August 7, 1897, she testified that she only remembered two names of eyewitnesses to the marriage ceremony between herself and soldier; that one was Elizabeth Smith and the other Jonas Youngblood; that she could not find them or learn where they were; that she had heard that Youngblood and the minister, Parson Hayes, that married them, were dead; that she could not furnish the evidence of eyewitnesses to said marriage; that she never eloped with soldier prior to the decree of divorce from her first husband, Daniel Davis, "nor was not in adultery at any time with him prior to his said marriage."

Before the special examiner at Billings, Mo., she testified, February 17, 1898, that she was 55 years of age; that she became acquainted with soldier near Richmond, Iowa, in 1863, he having just been discharged from the army, and was married to him on the 18th of November, 1866, on a boat, name not remembered, about 50 miles from Nashville on the Cumberland River, in Tennessee, near a place called Silver Springs, by Parson Hayes, a Baptist preacher, given name not remembered, who gave them a written certificate, with two witnesses, showing their marriage; that she was not acquainted with the preacher, but that he claimed he lived in Tennessee; that the names of the witnesses were Josiah T. Youngblood and Miss Lizzie Smith; that she had been informed that Mr. Youngblood was dead and was unable to ascertain what became of Miss Smith, but had heard that she married Dr.

Moore, somewhere in Kentucky; that she had an idea that their marriage was recorded at Lebanon, Tenn., for the reason that she heard that the preacher, Hayes, lived near there.

She further testified that her maiden name was Angeline York; that she was first married to Daniel Davis, in Clark County, Mo., September 9, 1856, a day's drive from Richland, Iowa, by Squire Farris; that after their said marriage they returned to Richland, Iowa, and lived together, off and on, up to the beginning of the war, and then separated; that she had not been living with Davis for five or six years prior to her marriage to Adamson; that she hears Davis got a divorce from her on the ground of desertion and adultery October, 1866, a little over a month prior to her marriage to Adamson; that she did not live with Adamson prior to their marriage; that he took her to Liberty, Dekalb County, Tenn., in the spring of 1866, and they lived there until the following November, when they started to Illinois, and thence to Richland, Iowa; that she taught school at Liberty, Tenn., in the summer of 1866, and Adamson staid part of the time at his Uncle Jeff Rulis's, and part of the time boarded in Liberty; that they did not keep house together then, but did when they returned there in 1870, where they lived two years; that Adamson's father lived and died there; that when they lived there in 1866 they occupied the same apartments sometimes when he came to see her, but not as man and wife; that after their marriage in 1866 they lived together continuously until April 23, 1885, when she went on a visit to her parents, who were living at Eddyville, Iowa; that while she was on that visit she heard that Adamson had took up with another woman—Mrs. Brown, of Billings, Mo.—and took her into their house; that when she received this information her father, and brother—William A. York, of Mingo, Iowa—would not permit her to return to Adamson, and they never lived together afterwards; that when she left him she had no intention of deserting him, but after her arrival in Iowa she received letters from several neighbors, women, that Mrs. Brown and her husband had moved into their house, and that her husband and Mrs. Brown were intimate.

Question. While you were in Iowa on that visit did you commence proceedings for a divorce from Adamson?

Answer. I did not. I returned here (Billings, Mo.) from Iowa about the 20th of October, 1893, having heard of his (Mr. Adamson's) death on the 17th of October, 1893.

Question. Do you know whether your late husband, Mr. Adamson, ever got a divorce from you, or commenced proceedings to get a divorce from you?

Answer. He never got a divorce from me, but I heard that he commenced proceedings at Ozark for a divorce from me, but withdrew the suit. I heard that his charge was desertion.

She further testified as follows:

After our marriage, in 1866, we returned to near Richland, Iowa, and lived there until we went back to Liberty, Tenn., in 1870. From Liberty, Tenn., we moved to Eddyville, Iowa, and lived there from 1872 to 1875, when we moved to Mexia, Tex., near Houston. We lived in Mexia until November, 1879, when we moved to Ozark,

in this county. We lived at Ozark (Missouri) until March, 1880, when we moved to this place (Billings, Christian County, Mo.), and this has been my home since.

After some disagreement between us about my youngest brother, Calvin V. York, living with us, I visited my brother at Verona, Lawrence County, Mo., and consulted Squire Grammar (deceased), of that place, about getting a divorce from Adamson. Mr. Grammar made notes of what I told him, but I do not think he even filed a suit for divorce. As a ground for divorce I alleged against Mr. Adamson ill treatment, drinking, and nonsupport. He was also awfully jealous. I made up with him and lived with him after that until I went to Iowa.

Question. Did Mr. Adamson ever claim that your marriage to each other was not legal?

Answer. He wrote me when I made that visit to Iowa that our marriage was not legal, but he wrote me afterwards, calling me "Dear wife" and offering me \$100 if I would join with him in signing some deeds to lots in this town. I did not sign the deeds, and he sold the lots. I have never brought suit for my interest in said lots because I had no means to pay attorneys.

After the death of Mr. Adamson his nephews, Len Walker, John E. Adamson, and Hiram Garrison, were appointed by the probate court of this county as administrators of his estate, and I was given a life lease on this house and lot and \$200 by compromise. * * * I heard that Mr. Adamson's estate amounted to between \$2,000 and \$3,000, and that he owed over \$1,000. * * * After our marriage Mr. Adamson and I were recognized as man and wife by the neighbors where we lived and by our relatives on both sides. Mr. Adamson always spoke of me as his wife and he always introduced me as his wife. I did not have any child or children by my first marriage to Davis, but I had one child by my marriage to Adamson, who died in infancy when he was about an hour old. I never heard of Mr. Adamson living with any other woman as his wife. He did not live with Mrs. Brown as his wife.

After Mr. Adamson withdrew his suit for divorce he wrote me, addressing me as his wife. I joined with him in making deeds when he sold property in Eddyville and Trenton, Iowa, in 1870 and 1874, and I joined with him in making the deed when we sold our home in Mexia, Tex., in 1879.

The affidavit of the attorney, Giltman, that he obtained the decree of divorce of my first husband, Davis, from me, was forwarded to me by my mother, now dead, immediately after it was obtained, and I received it at Liberty, Tenn., before I married my second husband. I was under the impression that Parson Hays wrote on the back of said affidavit a statement to the effect that he had married us. I know that said affidavit was handed to Parson Hays to look at before he performed the marriage ceremony. We did have a nice printed marriage certificate that was framed and hung up in our house for several years, but Parson Hays did not sign that certificate. His name, however, was to it. When I made that visit to Iowa and returned here after the death of Mr. Adamson I was unable to find the framed copy of said marriage certificate. My late husband, Adamson, was born in 1837, and I am quite certain that he never had been married prior to our marriage.

Within a few weeks after I started on the visit to Iowa Mr. Adamson advertised in the paper here that I had left his bed and board without just cause, and the editor sent me a copy. That charge was false. I did not come back right away because he had that woman Mrs. Brown in the house and did not want me, and my father and brother did not want me to come back. When I heard of his death I came back here to claim my rights as his widow.

Before the special examiner October 25, 1898, after having heard read the adverse testimony against her, she testified in response to the question as to the names of those of whom her husband was jealous, as follows:

I do not know that I could do that or not. He was jealous of a great many men. He was jealous of someone nearly everywhere we lived, and without just cause. He

was even jealous of preachers when they came to our house to hand me the songs or anthems they wanted me to play in church, or if they came to hear me play over the songs or anthems. He did not like preachers, and did not want them to come about. He was jealous of his brother-in-law, B. J. Hancock; his nephews, Bud, W. L., and Bud Adamson, and Will Adams, all of Mexia, Tex. He was also jealous of John L. Tunnell, his partner in business at Ozark, Mo.; also of Felix and Marshal Lawings, my cousins in Ozark. He was also jealous of Josh Pearsall, Will Wilkinson, and George Beck, of Billings, Mo. He used to throw up the names of the men referred to by me, as if he thought they had intimate relations with me. He was even jealous of his own nephews, Thomas, John, and William Walker, of Ozark. I declare most positively that I never had any improper relations with any of the men I have named, nor with any other man after I commenced to live with him, decedent.

I have read the depositions of Ann A. Garrison, Thomas L. Robertson, Leonard Walker, John K. Tunnell, John Grammar, Lawson Garrison, Dr. J. Z. Scott, Lewis P. Wills, Dr. E. B. Brown, Mary Nevil, Peter M. Laney, and Dr. Thomas R. Appleby, and I am satisfied that the evidence of Leonard Walker and Peter M. Laney are strongly biased against me, and that in accepting it their strong bias should not be lost sight of. That part of Walker's testimony which asserts that he saw a man crawl out of my bed one night at his mother's is absolutely false. Amanda Walker, a sister of Leonard, who was then 13 or 14 years of age, slept with me every night that I stayed at Mrs. Walker's. I never heard the story before. No man came there to see me. I think the Walker family and some of the Garrison family have a motive in testifying against me. I have heard it talked that they think if I get my pension that I will enter suit to recover the property which they got from Mr. Adamson's estate. I also think Mr. Laney has a motive for testifying against me. He and his wife were unfriendly toward me for some time because I discharged his sister-in-law, his wife's sister, before Mr. Adamson and I separated. Mr. Laney also had a falling out with my brother, Dr. York, which I think has made him have some animus against me. He appears friendly now, however. I never heard of the red-ladder story until I returned here after the death of Mr. Adamson. He, Mr. Adamson, never said anything to me about Jackson, for Mr. Adamson's store was right under our room and he was always in the store, or in our room, and we slept together. Our rooms fronted on the street, and the window referred to was on the side and also near the street. Adamson would talk recklessly when drinking, and it was when he had been drinking that he was jealous. He never accused me about other men when he was sober.

Thomas L. Robertson, aged 42, a merchant at Ozark, Mo., testified before the examiner October 20, 1898, that he was acquainted with soldier and claimant when they lived in Ozark, Mo., about twenty years ago; that they lived together as man and wife, and thinks he had heard soldier mention her as his wife; that there was a rumor there to some extent that she was not a straight woman, but that he never saw anything in her conduct to censure; that he had heard her name associated with T. B. Walker, in an adulterous relation, and that she had adulterous relations with other men while they were living at Billings.

Leonard Walker, aged 32, a lawyer at Springfield, Mo., testified October 19, 1898, that soldier had told him at different times that he was never married to claimant; that she came to their house near Ozark, Mo., about 1877, with her brother, C. V. York, from Eddyville, Iowa, having left soldier at Mexia, Tex.; that soldier told him that he had sent her back to Iowa from Mexia, because he had contracted a

loathsome disease from her; that claimant played a ruse on his mother by writing to her that she wished to visit her, and his mother permitted her to come, not knowing that soldier had left her; that she stayed at their house, as he recollects, about eighteen months, and taught a subscription school; that she was a very bright woman and wrote a novel or two, so she said; that from her story to his (deponent's) mother, his mother induced soldier to permit claimant to return to him in Texas, and she left their house and returned there to soldier; that soldier and claimant returned to deponent's mother's house again in the fall of 1879, and after staying a few weeks moved to Ozark, where soldier formed a partnership with J. L. Tunnell, in drugs and general merchandise; that after staying in Ozark about nine or ten months soldier sold out his interest and moved to Billings, Mo., where he died; that while claimant was at their house people got to talking about her unfavorably, and he (deponent) saw a man crawl out of her bed one night in the summer time, when it was warm and the doors were left open; that he had his suspicion who the man was, but as he had removed from the county did not care to connect his name with the case; that after they had separated the last time, soldier came to deponent to see about getting a divorce, and told him (deponent) that he (soldier) had contracted a loathsome disease from her; that her reputation for chastity had been bad while he knew her; that he (deponent) did not think he was biased against the claim, but did not think that claimant was faithful to soldier as his common-law wife, and that he is satisfied there was never a ceremonial marriage between them.

Rolin Grammar, of Billings, Mo., a barber, aged 42, testified that he had known claimant as the wife of soldier since June, 1881; that soldier always spoke of and introduced her as his wife, and they lived together as man and wife until they separated and she went away; that he understood they separated because her brother Bose, who was a drunken fellow and a cripple, threatened to kill Mr. Adamson, and because he and Mr. Adamson did not get along together; that claimant said if her brother had to leave that she would; that her reputation for chastity had been good, so far as he knew; that she was a music teacher and gave music lessons to a man named George Jackson, as he heard, and he heard that George Jackson was not taking music lessons for any good; that Jackson was a married man and had children, was a blacksmith and a fiddler; that Jackson denied that there was anything wrong with claimant; that claimant gave music lessons over soldier's store, and he never heard that soldier objected to Jackson's taking music lessons of claimant; thinks if she had had adulterous relations with other men he would have known it; that his (deponent's) first and second wife took music lessons of claimant, and her associations while at Billings were with the respectable families of that place.

Landon Garrison, of Billings, Mo., a saloon keeper, aged 29, testified October 18, 1898, that he had known claimant for eighteen to

twenty years as the wife of Thomas B. Adamson; that he first knew her when she came to his grandfather's, Len Walker's, near Ozark, Mo.; that she had a school about a mile and a half from Mr. Walker's, and he boarded at the same place with her and attended her school; that Adamson was then in Texas; that after she taught her term of school out she returned to Adamson in Texas; that after a while they both came back to Ozark, Mo., and soldier went into some business with Mr. Tunnel; that he afterwards sold out his business in Ozark and came to Billings, Mo., where he remained till his death; that he (deponent) stayed in the store with Adamson, in Billings, nine months, in 1887, after they had separated; that her reputation for chastity had been good so far as he knew, and he never heard her character talked about prior to Adamson's death; that he has since heard someone say that he thought years ago that she might not have been all right, but his statement did not satisfy him that his insinuations were just; that claimant was a leader in Ozark, taught music, and was regarded as prominent; that he never heard Adamson complain of any unfaithfulness on the part of claimant; that he understood that claimant's brother was the cause of their separation.

Dr. Joseph Z. Scott, of Billings, Mo., aged 70, testified October 18, 1898, that he had known claimant since 1881 as the wife and widow of Thomas B. Adamson, who introduced her to him as his wife soon after he got acquainted with her; that he never heard him speak of her in any other sense; that they lived there as man and wife until she went to Iowa; that he had never heard a word said against her chastity since he had known her, not even by Adamson; that his acquaintance with her has been such that if she had had intimate or adulterous relations with other men, he (deponent) would likely have known it; that her associations while in Billings were with the best and most respectable people; that her profession as musician admitted her into the best families there; that Mr. Adamson kept a drug store there, and deponent frequently bought medicines of him; that he thinks Adamson talked as confidentially to him as to anyone there, and if he had any grievance or complaint against claimant in regard to unfaithfulness or intimacy with other men, he would have told him; that he does not remember hearing him speak of the cause of their separation; that he thought claimant was a member of the Methodist Church and was church organist for some time.

George M. Scott, of Billings, Mo., aged 37, a carpenter, testified that he had known claimant since November, 1880, as the wife and widow of Thomas B. Adamson; that her reputation for chastity had been good; that her associates while there were with the respectable people; has an idea that their separation was on account of his excessive drinking habits; that Adamson as one of the county judges had him (deponent) appointed as road overseer in his district; that he did not hear the cause of their separation; that he was absent in Colorado about eight years.

Louis P. Wills, of Billings, Mo., aged 48, a liveryman, testified October 18, 1898, that he had known claimant and soldier ever since they came to Christian County, Mo.; that her reputation for chastity and faithfulness was good; that he never heard any talk about her character until after soldier's death, and put no confidence in the talk he had heard since.

Dr. E. B. Brown, of Billings, Mo., aged 52, testified that he knew soldier before the war, and became acquainted with claimant when she came with him to Ozark, Mo., in the seventies; that she came there as his wife, and he so introduced her to his friends and neighbors; that they stayed at his sister's, Mrs. Len Walker's, while they were about Ozark; that the first time they came to Ozark they were there probably not more than a year; that the next time she came alone and stayed at Len Walker's and Hiram Garrison's until he came; that while there this time John L. Tunnell, of Ozark, gave me to understand that he did not believe she was faithful to her marriage vows; that he thinks that Tunnell had a motive for his remark, and was biased against her because she talked about his cheating in his weights and measures; he was in partnership with soldier in the drug business in Billings two or three years, and after he and claimant had separated he always claimed when in a natural mood that he thought she had been faithful to him; but at other times when he was out of humor and drinking he would intimate that she was too free in spending his means with her relations, the Yorks; that he thinks that soldier made him a good deal of a confidant, and in his most intimate confidential conversations about her never claimed that she had been unfaithful to him.

Mrs. Mary Nevill, of Billings, Mo., testified October 18, 1898, that she had known claimant about eighteen years; that she became acquainted with her in Ozark, Mo.; that she stood well there, but was not so well acquainted with her there as after they moved to Billings; that she then lived just across the street from her and her late husband for four or five years perhaps before they separated and was on visiting terms with her; that she belonged to the Methodist Church, was the organist, and gave music lessons; that she never heard anything against her while at Ozark, but did hear some talk about her before she left Billings for Iowa, but did not put any confidence in the talk; that claimant was a woman of prominence and associated with the best people up to about the time she left for Iowa.

Peter M. Laney, aged 48 years, a blacksmith, of Billings, Mo., testified October 25, 1898, that he became acquainted with soldier and claimant about September, 1881; that when they came to Billings they were living as man and wife, and continued to so live together until she left him and went to Verona, Lawrence County, with her brother, Bose York, where they stayed for some time; that when she went she took a good part, if not nearly all, the household goods and furniture; that he (deponent) was then town marshal and was called in by Mr. Adam-

son to see what was taken away; that he went and saw that nearly everything was taken away; that claimant took with her a girl of not very good character, and it was reported that she kept a disreputable house at the place where she stopped; that he hardly knew what to say as to claimant's reputation for chastity while in Billings; that there was a rumor that a man, George Jackson, who was working with him (deponent) in the blacksmith shop there, had improper relations with claimant; that Jackson in a conversation with him (deponent) admitted that he had adulterous relations with claimant many times; that he first admitted it when he asked him what their ladder was doing outside the shop, and he said that he was using it to get up to claimant's room, which was upstairs over soldier's store; that he said he made these visits of nights frequently, when he had favorable opportunities; that he warned Jackson that his actions were dangerous and afterwards Jackson informed him that he had made other arrangements; that he had arranged and was taking music lessons of claimant, and that when he wanted to have adulterous intercourse with her he took his fiddle and went to see her; that he (deponent) belonged to the same church with claimant and so far as personal knowledge goes, he knows nothing about her adulterous conduct; that aside from Jackson and soldier he never heard her reputation for chastity questioned; that Adamson told him after she had left him the last time the entire history of their relations, which he (deponent) had given in a former deposition; that Adamson gave him to understand that he knew or suspected her adulterous relations with Jackson.

In his former deposition, February 22, 1898, he testified that after claimant left Adamson he talked the matter over with him (deponent) probably several times and told him that they were never married; that he was wounded in the war, discharged, and went to Iowa, and became acquainted with claimant, who was a married woman; that their relations were intimate for some time; that he told her that their intimate relations should cease before her husband returned from the war; that he went to another part of Iowa, and she followed him there; that he then went to Tennessee and was teaching school, and she followed him there; that he went to Texas, and she followed him there; that he divided his money with her in Texas, and sent her home to Iowa; that he then thought he was "shut of her" for good, and came to see his sister in this county; that when he arrived there he found her there; that they lived together for a while at Ozark, and then moved to Billings, and lived together until she left him.

Dr. Thomas R. Appleby, of Billings, aged 49, testified October 25, 1898, that he had known claimant and soldier from the time they first came to Billings; that they lived together as man and wife, and he so introduced her; that soldier got to drinking, and they did not get along well together; that he knew nothing against her reputation, and never heard anything against her, aside from the story of Jackson and the little red

ladder; that soldier told him that he did not believe the story, and continued to live with her after he heard the story; that he (deponent) considered the story improbable.

John L. Tunnell, aged 57 years, of Ozark, Mo., testified October 20, 1898, that he had known claimant and soldier about nineteen years; that they lived in Ozark a few months, and he was in partnership with soldier; that his acquaintance with claimant was limited, but saw her frequently; that he never heard anything against her character until after soldier's death; that he knows nothing against her personally; that after their separation soldier told him that when he was a single man clerking in a store claimant would come there and stay all night with him; that he always spoke of her as his wife, and introduced her to me as Mrs. Adamson; that it is his recollection that he said that they were not regularly married.

William L. Adamson, of Mexia, Tex., aged 47, testified November 24, 1898, that he became acquainted with soldier and claimant in the winter of 1874, after their coming to Mexia, Tex.; that he did not know where they were married, but heard they were married up North—in Iowa, he supposed; that they were regarded as man and wife while they lived in Mexia—about five years—and left in 1879; that he heard that they did not get along well together, and that her brother hit him with a chunk of wood, and he and she went away together; that her brother was a sort of a cracked-brained fellow named Bose, or some such name; thinks soldier was jealous and drank a little; that he never saw anything in her conduct to lead him to believe there was any cause for jealousy; that the impression was that owing to their not getting along agreeably that there must have been something wrong on her part to cause jealousy; that when they first came to Mexia soldier told him that while they had not been getting along well together, he was not satisfied without her, and asked me what he ought to do about it; that he did not say that she had been unfaithful to him, but it looked as if he lacked confidence in her; that this was when he first came in 1874, before she came; that when she came that was all dropped, and he never said anything of that kind after she came; that there was a little suspicion that T. A. Hord was too familiar with her; that there was a little talk that claimant and B. J. Hancock were intimate—a sort of rumor, but nothing positive; that he remembers when claimant sent a note to the bank there against J. B. Hancock—\$800; that the banker—W. L. Griggs—showed it to deponent, and asked his opinion about it; that he told the banker that it looked as if she had got Hancock's name and wrote the note above it; that it looked as if it might have been a leaf out of his little memorandum book; that Mr. Griggs said, "Then you think it might have been for an illicit purpose," and deponent replied that he thought it might have been.

B. W. Adamson, of Mexia, Tex., aged 57, testified November 24, 1898, that soldier was his uncle; that he became acquainted with

claimant when she and soldier came there, fifteen or twenty years ago; that they passed for man and wife while they were down there, but he did not know whether they were married or not; that they were there from three to five years and then went back north; that he never heard them say where they had been married; that he heard that they had separated after they left; that she knocked him in the head and took all the money and left; that he could not say what her reputation was while in Mexia, but knows nothing against it.

William L. Adams, of Mexia, Tex., aged 61, a half uncle of soldier, testified November 24, 1898, that he became acquainted with claimant whom soldier claimed to be his wife when they came there, about twenty years ago; that they lived there four or five years; that he does not know if they had ever been married or not, but it was understood they were man and wife while there; that he heard they got along well and heard that they did not; that he heard talk of its being suspected that she was intimate with T. A. Hord, now of Oak Cliff, Tex., and B. J. Hancock, now dead, but only heard it whispered; that soldier was a man who drank some while there, but never saw him drunk.

T. A. Hord testified that he never held improper relations with claimant, and never heard it charged that she was guilty of improper relations with anyone; that while he was a bachelor in those days and no strings on him, that claimant was not a woman to have been attractive to him; that he was not aware of the slightest jealousy on the part of her husband, and is certain that there was no cause for it.

Angeline Lurbaugh of Eddyville, Iowa, an aunt of claimant's, aged 74 years, testified before the special examiner that she had known claimant since she was a child; that she married Dan Davis when she was but 14 years of age; that her parents opposed the marriage and they ran off and were married, and lived together until Davis went to war; that Davis was a drinking fellow and had the name of being intimate with other women; that she left him and came home and stayed a while before he went to war.

Question. You knew Thomas B. Adamson?

Answer. Oh Lord, yes. He stood in the store.

Question. How did the intimacy between Adamson and this claimant come about?

Answer. Well, after Davis went to war, Adamson commenced to wait on claimant just as any young man would. No, he did not go with her any before Davis enlisted. My sister was opposed to Adamson's attentions under the circumstances, but she had no idea that she would run off. Adamson had not waited on her long until they went away. They said they had been away and had been married; claimant said they had been married in Missouri, and I said she ought to have had writings. I found out afterward that people could get married in Missouri without license at that time, and that reconciled me and her mother. No, she did not tell me she was married on the steamboat on the Cumberland River, Tennessee; she stuck to it that she had been married in Missouri. I never saw any purported certificate of their marriage. She and Adamson went away together without our knowledge. I missed them, and when they came back they were married. I was here when they came

to Eddyville; she visited me when they were in Trenton, Iowa. They got along all right so far as I know. I do not know that Adamson was intimate with any other woman; I do not know that he was jealous of claimant; she lived with him as his wife; they represented themselves as man and wife. I remember when she came to Eddyville, Iowa, in say 1885, she came to her mother who was sick and stayed here with her parents and her brother and Adamson did not come here. She said she was afraid to go back while he was drinking. I do remember it was said he drank in Missouri. I heard nothing of his living with Mrs. Brown in Missouri. She went with no man here from 1885; and I saw no act on her part and heard nothing against her character for chastity. She taught music, was organist in the church, and the best people patronized her. She claimed to be a medium in the spiritual world and held seances. Her reputation for chastity and virtue while here in 1872, and in Trenton, Iowa, and in 1874, and again from 1885 on was the best. I heard nothing to the contrary.

Eva McNess, of Eddyville, Iowa, aged 44, a cousin of claimant, testified September 24, 1898, that she had known claimant from her earliest recollection; that she knew her first husband Davis, and used to stay with them sometimes and go to school from their house; that she also knew Adamson and claimant in Richland, Iowa; that he came there and was in someone's store, either as a partner or a clerk; that Davis and claimant did not get along well together; that it was as much his fault as hers; that Davis drank and had the reputation of being intimate with other women; that she commenced to go with Adamson after Davis enlisted; does not remember that it caused talk at the time; thinks Adamson went away first and she followed; that claimant always told her that she was married in Missouri. She did not tell me that she was married on a steamboat on the Cumberland River, Tennessee. She did not say where in Missouri she was married; next saw her at Eddyville, or when they resided in Trenton, Iowa; that they then said they had been married. She said that they had a certificate of marriage, but deponent does not remember having seen it; that she lived one summer with claimant and soldier at Trenton, Iowa, and also lived with them in Eddyville, Iowa, perhaps in 1870 to 1874 or 1875; that they got along domestically all right there except when he was drunk; that he was in the drug business there; that when he came in drunk he was noisy and then they had trouble; that otherwise they lived peacefully; that neither was jealous on account of the other of indecent conduct with others; that claimant was engaged in the millinery business and gave music lessons in Eddyville; that she was intimate with claimant after she came back, about 1885, and saw her every day; that she gave music lessons; that her conduct was above reproach and deponent never saw or heard of anything that would excite suspicion; that she did not say that she had separated from her husband, but she did not go back; that she said that whisky was the cause of their trouble, and made no mention of Mrs. Brown or other women; that she claimed to be a medium and held seances, but does not know that she made any money that way; that she never heard her spoken slightly of; that she went into the best society.

William H. Hays, of Cottage Home, Wilson County, Tenn., a farmer, aged 63 years, testified July 8, 1898, that he was the son of Nathaniel Hays, who was a Baptist minister; that he was the administrator of his estate and had looked over his papers several times, but found no records of marriages performed by him; that he knew Thomas Adamson, who was a second cousin of his (deponent's) wife, and had seen Angeline Adamson once or twice; that they lived together as man and wife in Liberty, Tenn., about thirty years ago, and deponent never heard their marriage relations disputed; that he never heard his father speak of marrying any couple on a boat on the Cumberland River; that it was his (deponent's) understanding that they were man and wife when they came to that place, and that they lived together as man and wife when they first came there; that if they ever got married after they came there he (deponent) never heard of it; thinks he heard she was an Iowa woman and that after he (soldier) died she claimed his property; that he also heard that they had separated before he died; that he knew Josiah Youngblood, who is dead; that he does not know Lizzy Smith nor Dr. Moore.

J. F. Youngblood, of Liberty, Dekalb County, Tenn., aged 59, a miller, testified July 8, 1898, that Josiah Youngblood was his father, and that he died about fifteen years ago; that he never knew Lizzy Smith or a Dr. Moore; that he knew Thomas Adamson and Angie Adamson; that they came to Liberty, Tenn., as man and wife and lived in that relation; that there was no doubt as to their marriage when they first lived there; that she had a brother, Bill York, who shot a negro and ran away from there; that he does not remember whether it was the first or second time they were there that Bill shot the negro; that Adamson and Angie both taught school there; she assisted him, and they lived together as husband and wife at that time; that he never heard his father speak of having witnessed the marriage of claimant and Thomas Adamson; that he is certain that his father was never on Cumberland River after the war; that he never heard that they got married after they came there; that since Adamson's death claimant had written him a long letter concerning her marriage to Adamson, and asked him if he was at Silver Springs when they were married; that she did not state in that letter that they were married on a boat; that he was not at Silver Springs at their marriage; that Adamson lived there before the war; that when he came there with claimant he said to him: "Jim, come in and let me introduce you to my little Yankee;" that he introduced her as his wife; that he never had a suspicion that they were not married until since he died and they wrote asking about it.

The special examiner reported that the records of Smith County, Truesdale County, Sumner County, and the other counties bordering on the Cumberland River show no record of the marriage of claimant or soldier; that he could find no one who had any knowledge of Miss

Lizzy Smith or her alleged husband, Dr. Moore; that he saw all the old residents of Liberty, Dekalb County, Tenn., and that their version of the matter agreed with that of J. T. Youngblood.

It appears from a copy of the petition in the divorce case of Daniel Davis *v.* Angeline J. Davis that Davis alleged his marriage to claimant on September 9, 1855, at Scotland County, Mo.; that he continued to live with her as her husband until about the 4th day of May, 1863, when he entered the Volunteer Army of the United States; that while he was in said service claimant eloped with one T. B. Anderson. The bill in effect charged desertion and adultery, and the district court for Keokuk County, Iowa, granted complainant a decree of divorce from claimant on October 2, 1866, on the ground of adultery and elopement.

It further appears from the evidence that claimant, after deserting her second husband, filed an application for divorce in 1885; that her bill or petition was demurred to and leave was given her to amend; that she failed to amend, and her suit was dismissed February 23, 1886; that thereupon the soldier employed an attorney to file a bill or petition for divorce from claimant, but the records fail to show that his bill or petition was ever filed.

A postal card dated July 16, 1879, and a letter dated August 2, 1886, purporting to be from soldier to claimant, are filed, in which the writer addresses the correspondent as "Dear wife."

It also appears that T. B. Adamson, in April, 1885, published a notice in the Billings Weekly Times, in which he warned all persons not to trust his wife, Mrs. Angie Adamson, on his account, as she had that day left his bed and board without permission.

It further appears that claimant, on October 29, 1893, filed a petition in the probate court for the county of Christian, Mo., praying for the revocation of letters of administration appointing Hiram F. Garrison, Leonard Walker, jr., and John E. Adamson as administrators of the estate of Thomas B. Adamson, deceased, and that she as the widow of deceased be appointed in their stead; that her said petition was denied by said court, whereupon she sought to appeal from the action of the court, and obtain an order from the court granting her appeal; that the court refused upon the ground that she was not the widow of deceased, but a stranger to the record; thereupon claimant proceeded by mandamus to compel the allowance of her appeal. Her writ was allowed, and she was allowed her right of appeal, whereupon she compromised her claim as the alleged widow of soldier by accepting a life lease of a small house and lot in Billings, Mo., and \$200.

It is now contended by claimant, in her appeal, that the evidence shows that she is the legal widow of soldier; that marriage is established under the common-law rule of cohabitation and intention in Tennessee and Missouri, and that the evidence is sufficient to settle the legal presumption in favor of the marriage; that marriages at common law, not solemnized in accordance with the statutes are valid,

unless declared void by statute; that cohabitation and public acknowledgment as husband and wife constitute legal marriage, and cites the cases of Elizabeth Felber (4 P. D., 329) and Harriet Ford (5 P. D., 239).

The theory that there was ever any ceremonial marriage between soldier and claimant appears to be abandoned, and the theory of a common-law marriage, or marriage per verba de presenti, is relied on to support the claim for pension.

The Supreme Court, in the case of *Blackburn v. Crawford* (3 Wall., 175), held that where the party had alleged a particular marriage at a particular time, the question of a marriage per verba de presenti did not arise.

It is clearly evident that claimant has wholly failed to establish a ceremonial marriage with soldier. Aside from her own there is not a particle of evidence tending to support her testimony on this point. There is no record evidence of said alleged ceremonial marriage, nor is there a single witness produced who was present, or had any knowledge of the alleged ceremonial marriage in 1866. On the contrary, the evidence tends strongly to show that no such marriage ever took place.

Claimant's own testimony and statements are conflicting and irreconcilable. She first testified that said marriage ceremony took place at Silver Springs, Tenn.; she next testified it took place on a boat on the Cumberland River, and when she returned to her relatives in Iowa from her first trip to Tennessee she stated that it had taken place in Missouri.

She claims to have had a certificate of her marriage on the boat, but she fails to produce it or satisfactorily account for its absence, or produce a single witness who ever saw it. She admits that the framed certificate which her brother saw was a printed form, and that the name of the alleged officiating clergyman, whose first name she does not recollect, was not the signature of the clergyman, but was a copy merely.

Her alleged husband, the soldier, never admitted the marriage, but witnesses and claimant testify that he denied its legality, and Dr. James W. York, a brother of claimant, who is friendly to claimant, and whose reputation for truth is reported good, testified that "he (soldier) denied being married by ceremony after 1885." Peter M. Laney testified that "he (soldier) told me that they were never married." Anna A. Garrison testified that she had "heard Mr. Adamson say in his lifetime at different times that they were never lawfully married and that he was ashamed of it." Leonard Walker testified that "he, decedent, told me at different times that he was never married to her." John L. Tunnell testified that "it is my recollection that he said that they were not regularly married," while claimant testified that "he wrote me when I made that visit to Iowa that our marriage was not legal." The evidence shows that they never cohabited or saw each other after she received this letter.

The evidence clearly shows that claimant's relation with soldier was illicit in its commencement and it is presumed to so continue until a changed relation is proved. Actual marriage can not be presumed from cohabitation, conduct, declarations, and reputation, after the removal of the existing legal impediment by the decree of divorce from her first husband, unless a changed relation is shown, such as will raise the presumption of new consent. See the case of Harriet Comstock (10 P. D., 220).

Here no such changed relation is shown. The cohabitation, conduct, declarations, and reputation were the same after the removal of the legal impediment as they were before, and while their cohabitation was illicit and adulterous. When claimant first joined soldier at Liberty, Tenn., and prior to the date of the divorce of claimant from Davis, October 2, 1866, they cohabited as man and wife to all appearances, and were so regarded by their friends and relatives in Tennessee. Their conduct was that of husband and wife. The soldier introduced her as his wife, yet during all this time of their first residence in Tennessee, up to October 2, 1866, it was legally impossible for the parties to contract the marriage relation. Their cohabitation constituted a felony under section 4839 of Tennessee Statutes. *Finney v. State* (3 Head, 544). When they returned to Iowa their conduct in no manner changed from its former character in Tennessee, and the fact that they were regarded as husband and wife by their friends and relatives in Iowa was based upon fraud and misrepresentations on the part of claimant, who falsely alleged that they had been married in Missouri. When they returned to Tennessee the second time their conduct in no manner differed from their former conduct when they were living in adulterous relations, and the reputation that they then acquired among their friends and relatives was based upon the supposition that their former relations when first there prior to October 2, 1866, was lawful. Following their history from Tennessee to Texas, where it appears they first separated, from Texas to Ozark, Mo., and from Ozark to Billings, Mo., where they finally separated in 1885, while there is nothing to indicate a change of the original illicit relations, there are indications that both parties were aware that no marriage contract existed between them. The fact that soldier introduced claimant as his wife; that he advertised and addressed her as his wife; that they both took preliminary steps to obtain a divorce, and that she signed deeds as his wife, when taken into consideration with the other facts in the case, falls far short of proving marriage. When she presented her claim as the widow in the probate court, that court decided adversely to her, and the fact that she subsequently secured a reversal of the decision of the probate court by further litigation which did not involve directly the question of fact as to her widowhood, the fact remains that the judicial determination of the court of her own State is against her.

Cohabitation, conduct, declaration, and reputation do not constitute marriage, but are merely facts from which marriage may be presumed.

Marriage is a social domestic status, based upon contract, and consummated and controlled by law. The conduct on which the reputation of the parties is founded must be honest conduct, not a mere pretense or misrepresentation for the purpose of concealing a fact.

The relations of these parties in its commencement is shown to have been willfully illicit. Both had knowledge of the adulterous character of their cohabitation, and, as is held in the case of *Indiana Christie* (10 P. D., 15)—

A relation shown to be illicit at its commencement is presumed to continue so until proof of change; such a relation raises no presumption of marriage.

A continuance of cohabitation under such circumstances is but a continuance of an illicit relation, the effects of which are void from their inception, and so continue until a new and independent relation is established. See also the cases of *Eunice D. German* (7 P. D., 503); *Rachael Harvey* (*Ibid.*, 600); *Ann Eliza Server* (*Ibid.*, 468).

In the case of *Elizabeth Felber* (4 P. D., 329), cited by claimant, the facts in that case were quite different than in the case under consideration. Among other distinguishing facts, the claimant in that case did not desert her husband, the soldier, and the soldier did not repudiate his marriage, but in his "last days of lingering disease he solemnly made a will and called her his beloved wife Elizabeth."

In the case of *Harriet Ford* (5 P. D., 239), also cited by claimant, it was held that—

while it is true that a subsequent marriage may be inferred from subsequent acts containing evidence of intention to marry, accompanied by matrimonial recognition and general reputation, still it is incumbent to show that there were such acts, indicating a purpose to change the relation. Nothing of this nature can be shown in this case. All the evidence and the surroundings of the parties seem to negative the theory of any intention on the part of claimant and Smith to become man and wife;

and the Department accordingly held that marriage was not established.

Under section 2 of the act of August 7, 1882, Revised Statutes, the claimant is required to show a valid marriage under the laws of the State of Tennessee or Missouri.

The supreme court of Tennessee held in the case of *Jarnigon v. Jarnigon* (12 Lea, 292), decided in 1883, that—

In a case of dower, where the right depends on the fact that complainant was the wife of the deceased, and the question of her being the wife or lawfully married to the deceased is put in issue, the marriage would have to be proven, and while reputation and cohabitation, together with conduct of the parties, might, in some aspects of the question, be competent to show the fact, the law would not conclusively presume the fact from such circumstances.

The supreme court of Missouri held in the case of *Cargile v. Wood* (63 Mo., 501) that—

Where a particular status exists, the law presumes its continuance, and when it is asserted that it has been changed, some evidence of that fact must be produced. When the connection is illicit in its origin, the presumption is that it is likely to continue so, and if it is alleged that it was subsequently changed, it must be shown at what time it became lawful;

citing *Clayton v. Wardell* (4 Comst., 230), and *Cunningham v. Cunningham* (2 Dow P. C., 482). The court in the Missouri case did not lose sight of the principle that the law presumes against vice and in favor of innocence and good morals, and in favor of matrimony, and yet the facts in the case as to cohabitation and reputation were as strong, if not stronger, than in the case under consideration, yet failed to establish marriage.

The presumption of innocence and morality can not be invoked to override or outweigh a proven fact of guilt and immorality.

I am of the opinion that the evidence in this case fails to show any ceremonial or common-law marriage between the claimant and soldier, but shows that their relation was illicit in its inception, and continued unchanged until her desertion of soldier in 1885, eight years prior to death. The action appealed from is accordingly affirmed, and the papers in the case are herewith returned.

LINE OF DUTY—PROVOST-MARSHALS—EVIDENCE.

MINOR OF JAMES HAYNE.

In the case of a provost-marshal, deputy provost-marshal, or enrolling officer, wounded or injured during the period in which he held such office, there is no presumption that such wound or injury was received while such officer was in the discharge of his duty, but it must be proved that such officer incurred his disability in the actual discharge of his duty as such officer.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
October 18, 1899.*

James Hayne was appointed deputy provost-marshal for Auglaize County, Fifth Congressional district of Ohio, on June 9, 1863, in which capacity he served until discharge on April 20, 1865. It appears, also, that he died on March 24, 1869, leaving a widow, who also died on October 13, 1895, and one minor child under the age of 16 years. Said minor, Harry C. Hayne, filed an application for minor's pension under the general law on October 25, 1895, designated by No. 622620. This claim was adjudicated on July 29, 1897, and rejected on the ground of claimant's inability, although aided by special examination, to show that the fatal blood poisoning from which the father died was due to his service.

Assigning said action as error, appeal was taken on April 22, 1898, resting upon the contention therein set forth that the evidence on file establishes the fact that said deputy provost-marshal, while in line of duty, in attempting to arrest certain deserters or drafted men, was assaulted and beaten, receiving a severe contused wound upon the left leg, just above the knee; that said wound produced a permanent injury from which the said deputy provost-marshal died on the day above mentioned.

It is fairly well established by the evidence of a number of lay witnesses that during the term of the officer's service, just after a draft had been made in the fall of 1864, he exhibited a contused wound upon his left leg just above the knee, which, the witnesses say, had the appearance of having been inflicted with some blunt instrument. The wound is described by them as being a bad bruise above the knee, with the skin broken. There is no living eyewitness to the incurrence of said wound, but the soldier and his attendant at the time, now deceased, stated that while engaged in searching for certain delinquent soldiers or drafted men the officer was assaulted by relatives of said delinquents and severely maltreated, and that he received the said wound in that encounter by a blow from a gun in the hands of one of the assaulting party. Most of the witnesses say that said officer was a sound and healthy man prior to the incurrence of said wound, but that he was ever afterwards lame in that leg up to the time of his death. The evidence taken on special examination is conflicting in respect to the lameness of said officer. Two witnesses declare positively that he was lame before the war and prior to the time when he received the appointment to the position of deputy provost-marshal. According to the best recollection of still another witness, the lame condition of the officer existed prior to his military service. The nature or cause of the lameness, which they locate in the left hip, was unknown to the witnesses. Dr. Berlin appeared as a witness before the special examiner in 1895, at which time he deposed to the effect that James Hayne was injured in the fall of 1864 while acting as deputy provost-marshal; that upon being called to attend the wounded man professionally, he found a contused wound of the left leg above the knee, which, in appearance, indicated that it had been inflicted with some blunt instrument. The leg was slightly lacerated and bled some, with a contusion all around the wound. The witness does not remember how long he treated the officer for the wound, but does know, so he states, that the officer resumed his official duties before the wound was healed, and it is his impression that same never did heal. The witness states that he saw the officer "a good many times" after that, and gave him advisory treatment, and that upon inspection of the leg he discovered that a horny substance was growing out where the wound was, and on two or three other places in the neighborhood of the wound. The witness further states that the limb seemed to grow worse until the spring of 1869, when he was called in consultation with Dr. Shackelton, the attending physician, at which time he found the officer in a very dangerous condition. The injury to the leg, says the witness, had increased until the officer's constitution was broken down and he was very low. There was a scirrhus condition of the wound at that time. "He gradually grew worse," says the witness, "until in March, 1869, he died."

Under the foregoing facts, the issue raised by the appeal is, that it has been sufficiently proven that the death of the officer is due to an

injury incurred in line of duty, or, as section 4693, Revised Statutes, has it, "received in the discharge of his duty." The contention, substantially, is, that since it has been shown that claimant's father received the injury which resulted in death during the period in which he held the position of deputy provost-marshal, the presumption obtains that he was at the time in the discharge of his duty.

This contention leads to an inquiry as to the limitations which should be observed in the application of the doctrine of presumptions to cases which stand upon different relations. There is manifestly a material distinction in the application of this doctrine between cases in which the applicant was an enlisted man and those in which the pensionable status is based upon the rights of a deputy provost-marshal. It has been held in cases where the applicants are enlisted men that it is in accordance with public policy to presume that such are in line of duty when they are actually conforming to the regulations of the Army and the orders of their superior officers. This is true of such, no matter whether they be engaged in battle or loitering around their tents. It is just and proper that such a presumption should obtain, because the line of duty of an enlisted man is permanent and perpetual, with no suspensions or interruptions, covering all his acts and doings during the period of his enlistment. Not so with a deputy provost-marshal. The duties incident to such a relation are occasional and spasmodic, with frequent cessations. Such an officer is called upon to act as occasion or emergency may require, and during the intervals of leisure his freedom of action is not limited and circumscribed by army regulations, as in the case of an enlisted man. During the intervals of inaction it would be consistent with the duty of a deputy provost-marshal to pursue his own interest and pleasure, barring the limitation, of course, that he should confine his actions to the territory embodied in his own jurisdiction.

Inasmuch, therefore, as a deputy provost-marshal may not at all times during the period of his service be engaged in the discharge of his official duty, any injury which he may receive can not be presumed to have been incurred in the discharge thereof.

There is a material distinction created by statute between the pensionable relation of a provost-marshal and that of an enlisted man, indicated by the fact that the former is pensionable only for wounds or injuries received, but not for disease incurred during his period of service. This distinction is manifestly based upon the consideration that a provost-marshal may to a great extent select his own environments and surround himself with conditions conducive to the preservation of his own health, and is not constantly hampered by the rigid exactions of army regulations, as is the case with enlisted men. This view, relating to the obvious reason in the mind of Congress for creating such a limitation in the pensionable status of a provost marshal, lends much force to the position that no presumption obtains in behalf

of such an officer, since it involves the idea that he is not constantly in line of duty within the meaning of the pension laws.

In this case it was incumbent upon the applicant to show by competent evidence that the said provost-marshal incurred the alleged injury in the discharge of his duty.

Action affirmed.

MARRIAGE AND DIVORCE—EVIDENCE.

MARY C. ORR (ALLEGED WIDOW).

1. Where a claimant for pension, in order to sustain the legality of her marriage to the soldier, alleges that said soldier procured a divorce from a former wife (who also claims pension as his widow), in a certain county and State, she must prove such divorce by the records of the proper court in said county.
2. There could be no stronger presumption in favor of a second ceremonial marriage than there would be in favor of the validity and continuance of the first ceremonial marriage.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
October 21, 1899.*

Mary C. Orr filed in the Pension Bureau on May 14, 1897, an application for pension under the provisions of section 3, act of June 27, 1890, as widow of James Orr (deceased), late private, Company B, One hundred and sixty-first New York Volunteer Infantry, alleging the death of said soldier on November 6, 1896, leaving her without other means of support than her daily labor.

Said application was rejected on June 2, 1898, upon the ground that said Mary C. Orr was not the widow of said deceased soldier, it being shown by the evidence that he had obtained a divorce from her.

From said action appeal was taken on May 8, 1899.

It appears from the papers accompanying this case that on April 13, 1897, another woman, Samantha Orr, had also filed an application for pension under said section, claiming to be the widow of the deceased soldier, and alleging that he had been divorced from said Mary C. Orr prior to her marriage to him.

A special examination of the case was directed in order to ascertain and determine which of said claimants was entitled to recognition and pension as the widow of said soldier, and on the same date that the claim of Mary C., the first wife, was rejected upon the ground afore-said, June 2, 1898, the claim of Samantha, the second wife, was admitted, she was recognized as the lawful widow of the soldier, and pension allowed her under said section from the date of filing her application, which she is now receiving. The accrued pension due and unpaid on the invalid certificate of the soldier at the date of his death was also allowed and paid to Samantha as the soldier's widow.

A ceremonial marriage between the soldier and said Mary C., by a justice of the peace in the county of Montgomery, State of New York,

on March 19, 1854, is clearly established by the testimony of several credible witnesses, who were present at said marriage and witnessed the ceremony, and this fact is admitted and not disputed. It also appears in evidence that the soldier was married by ceremony, performed by a minister of the gospel, in the county of Schuyler, New York, on January 9, 1867, to Samantha, with whom he thereafter lived and cohabited as his wife until the date of his death. So far as the mere matter of solemnization is concerned both of these marriages of the deceased soldier stand on an equal footing. They were both ceremonial marriages, solemnized in accordance with the law of the State of New York, and the validity of the second marriage is asserted, not because of any illegality of the first marriage, but solely upon the ground that said first marriage had been dissolved by divorce prior to the second marriage being contracted.

The sole and only issue presented by this appeal is then, whether the soldier is shown by the evidence to have been divorced from his first wife, Mary C., prior to his marriage to Samantha, or at any time. If said first marriage was lawfully dissolved by a decree of divorce rendered by a court of competent jurisdiction prior to the date of said second marriage, as alleged, then the soldier was competent to contract said second marriage with Samantha, and she was properly recognized and pensioned as his widow. If, on the contrary, as is asserted by this appellant, Mary C., she was never divorced from the soldier, then the soldier was incompetent to contract said second marriage with Samantha, said second marriage was illegal and absolutely void under the laws of the State of New York, and Samantha is not his widow, and the recognition and grant of pension to her as such, as well as the rejection of the claim of Mary C. for pension as the widow of the soldier upon the ground aforesaid was erroneous and improper.

The testimony obtained on the special examination of this case shows that the deceased soldier and the first wife, Mary C., did not live happily together and separated about the year 1860, prior to the soldier's enlistment in the Army.

It is asserted and claimed by the second wife, Samantha, that the soldier obtained a divorce from Mary C., in Schuyler County, N. Y., about November, 1860.

The only evidence of this, however, consists of the testimony of the appellant and other witnesses, who state that the soldier, prior to his second marriage to Samantha in 1867, asserted that he had procured a divorce from his first wife, Mary C., about November, 1860, in the supreme court for the county of Schuyler, N. Y., on the ground of her adultery, and also that an attorney of said county had stated that he had been employed by the soldier to institute legal proceedings in said court for a divorce from Mary C., and had done so, and obtained a decree of absolute divorce, dissolving the marriage of the soldier to Mary C. on the ground of adultery. This attorney, whose name was

Van Duzer, was dead at the time this case was investigated, but a private docket of his, in the possession of his daughter, who testified that all the books and papers left by her father relating to his legal business were in her possession, showed the following entry:

SUPREME COURT, *County of Schuylcr*:

JAMES ORR against MARY C. ORR.	}	105. Summons and complaint for divorce. Served November 6, 1860, by Jarvis Dean.
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No other entry, however, was found in said attorney's docket relating to said proceedings, and no papers whatever having reference to a suit for divorce between the deceased soldier and said Mary C.

One witness, who states that he had been a constable in said county for over thirty years, and had been accustomed to serve most of Van Duzer's papers for him, testifies that about twenty or twenty-five years prior to giving his deposition Van Duzer had talked to him about the matter, and had told him he had obtained a divorce for the soldier from his first wife in said court about 1860, and showed him at that time a bundle of papers which, the attorney said, were papers in said suit; that he, the witness, had examined the papers at that time and found them all regular and in proper shape; that the ground of the complaint was adultery, and there had been a reference to take evidence, but there was not much evidence in the case, as there was no defense, but does not remember the name of the referee; recollects distinctly that the decree of divorce was attached to the other papers and was properly signed by the judge, but can not remember the name of the judge; that Van Duzer told witness that he was holding the papers and would not have them entered or recorded until the soldier paid him his fee for obtaining the divorce; and desired witness to try and collect his fee from soldier for him is why he showed him the papers and talked to him about the matter.

Several other witnesses testify that Van Duzer had declared and asserted on various occasions that he had obtained a divorce for the soldier from Mary C., and was holding the papers until his fee was paid. There is also testimony tending to show that shortly after the second marriage of the soldier to Samantha, this appellant, Mary C., had him arrested on a charge of bigamy, but that the charge against him was not pushed for some reason, and the matter was dropped, and he was discharged; but why he was not prosecuted, or why he was discharged no one seems able to state. None of the witnesses are able or willing to swear that the prosecution of the soldier on this charge was dropped for the reason that he had obtained a divorce from his first wife, although there seems to have been a more or less vague impression that such was the reason. This appellant, Mary C., and several witnesses for her, testify positively that no divorce was ever obtained by the soldier from her. She states that she appeared on one occasion before the judge of the supreme court in chambers, in response

to a summons served on her, at the county seat of Schuyler County, N. Y., when the soldier was present, and that the judge at that time made some inquiries concerning the marital relations of herself and the soldier, and informed the soldier he had no grounds for a divorce, and she never heard anything more of the matter. It is but just to state, however, that both this appellant and her witnesses are shown by the evidence to be unreliable, and persons of bad character, whose testimony is to be taken with great caution unless corroborated by other reliable evidence.

The county clerk of Schuyler County, N. Y., who is the clerk of all the courts of record in said county, and the legal custodian of all the records of said courts, has repeatedly testified in this case, both by affidavit and on special examination, that he has made several careful and thorough searches of all the records of the courts of said county in his office, and has been unable to find any entry or record whatever of divorce proceedings ever having been instituted by the deceased soldier, James Orr, or by this appellant, Mary C. Orr; and finds no judgment or decree on record dissolving the marriage between said parties, or divorcing the soldier from said Mary C., or anything pertaining thereto.

He also states that he has been unable to find any record entry showing that said soldier had ever been arrested or prosecuted on a charge of bigamy; that the only record entry in his office in which the name of the soldier appears was at a court of oyer and terminer, held in the court-house in the village of Havana, in and for the county of Schuyler, on the first Monday of December, 1867: In the matter of the discharge of recognizances, on motion of the district attorney, it was ordered by the court that the recognizance of James Orr be discharged; that, although he has made an exhaustive search therefor, he has been unable to find the recognizance referred to, and there is nothing on the record to show the nature of the charge against said James Orr, or why the recognizance was discharged.

The special examiner who investigated this case reports that he also made a search of the records of said county, and was unable to find any record of a divorce having been granted to the soldier from Mary C., or any entry or record showing that divorce proceedings had ever been instituted between said parties in said county.

Upon this evidence the chief of the law division of the Pension Bureau, on May 10, 1898, rendered the following opinion:

The weight of the testimony elicited by the special examination had in this case would appear to warrant the presumption that the soldier had been divorced from the claimant, Mary C. Orr, at the date of his ceremonial marriage, on January 9, 1867, to the claimant, Samantha Orr, and this presumption is strengthened by her ineffectual effort to have him prosecuted for bigamy; and these facts considered, in the light that all presumptions of law are in favor of the validity of the ceremonial marriage, the premises considered, I am of the opinion that, upon the evidence, a divorce can be presumed to have been granted the soldier from the claimant, Mary C., and that Samantha Orr can be considered the soldier's legal widow.

Acting upon this opinion, the action was taken in the claims as has hereinbefore been set forth.

With the conclusions of the chief of the law division, and the action of the Pension Bureau predicated thereon, I am totally unable to agree.

They are not only not warranted by the facts in evidence in this case, but are violative of the most fundamental principles of evidence.

In the first place, even if this were a case which would admit of a presumption in favor of the validity of either marriage of the soldier, there would unquestionably be no greater or stronger presumption in favor of the second ceremonial marriage to Samantha, as seems to have been assumed by the chief of the law division, than there would be in favor of the validity and continuance of the first ceremonial marriage to Mary C. As has been heretofore stated, they are shown to have been both ceremonial marriages, solemnized in strict accordance with the law of the State of New York, and if there could be any presumption about it it would rather be in favor of the continuance of the first marriage relation, the legality and validity of which has never been questioned, than of the second marriage, the validity and legality of which rests solely upon the assertion by the party interested that the first marriage had been legally dissolved prior to its contraction. In order to sustain said second marriage the party asserting it must establish this fact, and must establish it by legal evidence; the burden of proof is wholly upon the second wife, Samantha, in this case, to show the dissolution of the first marriage. It is true that in certain cases, where it is a matter of doubt and the absolute and positive facts can not be ascertained, and nothing appears to the contrary, courts will sometimes, from motives of public policy, presume the dissolution by divorce of a former marriage in order to sustain an existing or subsequent marriage relation entered into under the forms of law and long acquiesced in, acted upon, and recognized by the parties, but this is a case where no presumption whatever would or could arise. The facts of this case do not admit of a presumption in favor of the validity of the second marriage of the soldier to Samantha, but demand and require absolute proof that his first marriage to Mary C. had been dissolved by divorce, as alleged. Here it is asserted and alleged, as the sole ground for the legality of the second marriage, that the soldier had been divorced from his first lawful wife in a certain county and State, by a certain court, and at a certain time. Consequently the only evidence that could be admitted to sustain said allegation would be the record of the decree of said court granting such divorce, and unless such record was produced or its absence properly accounted for and explained no divorce could be established. In this case the evidence shows that there is no record whatever in the county of Schuyler and State of New York showing that any court in said county ever granted a decree of divorce dissolving the marriage between the soldier and Mary C., or that legal proceedings were ever instituted by either of said parties for that purpose.

It is more than probable from the evidence that the soldier did employ the attorney Van Duzer to bring a suit for a divorce from Mary C. about November, 1860, and that the attorney, under the practice in New York, prepared a complaint in said suit and had this appellant served with a summons to answer, as his private docket shows, but, undoubtedly, he took no further steps in the matter, at least no legal or binding steps, for the records of the supreme court for the county of Schuyler show that said suit never even got into court.

Even if it were possible to suppose, which would be an absurdity, that the attorney could, under the law and practice in New York, or anywhere else, carry through said divorce proceedings to a final judgment, including a reference to take testimony by a referee, and obtain a decree of divorce signed by the judge of the court in some private and mysterious way outside of court, with never an entry or order of record, such proceedings and decree would be absolutely and wholly nugatory, and of no binding or legal force and effect whatever, and would not constitute a divorce under the laws of the State of New York or of any other State or civilized country. Courts speak only by their records, and where it is asserted that a certain proceeding was had, and a certain judgment or decree rendered by a certain court, the only proof of that fact is the record of the court. Not only is there no proof in this case that a decree of divorce was ever obtained by the soldier from his first wife, Mary C., but there is no proof that he ever commenced legal proceedings to obtain a divorce. The fact that he employed an attorney to bring such a suit, and that the attorney took the preliminary steps to do so, and had a bundle of papers in his possession which he stated, to persons ignorant of the law, were the divorce papers, or "the bill of divorce," whatever that may mean, in the case of the soldier and his first wife, Mary C., is no evidence whatever that such a suit was ever brought, or such a decree obtained when the records of the court fail to show any entry, order, judgment, or decree relating to the matter, and is unworthy of serious consideration. The foregoing is so plain and obvious a proposition that it does not admit of argument, and requires no citation of authorities to support it. There is no proof in this case that any of the public legal records of Schuyler County, N. Y., have been lost or destroyed. There is testimony to the effect that some years ago the county seat of said county was removed from one town to another, and the suggestion is made that perhaps, in the removal, the papers and record in this hypothetical divorce suit between the soldier and his first wife were lost, but no witness is able to testify that this is the fact, and the testimony of the county clerk, the legal custodian of said records and papers, shows conclusively that the records of said county are intact, and have not been lost or destroyed.

The inference that appears to have been drawn from the testimony that the soldier had been arrested after his second marriage on a

charge of bigamy at the instance of this appellant, Mary C., and had not been prosecuted, but had been discharged without trial is wholly unwarranted by the evidence in this case. The testimony fails utterly to show why or for what reason said criminal charge against him was not pushed.

There is no proof whatever that he was discharged and released from arrest because of the fact that he had been divorced from his first wife, as seems to have been assumed.

In fact, there is no legal evidence that the soldier ever was arrested and prosecuted for bigamy at all. Such testimony as there is on the subject is open to the same objection that has been herein pointed out to the testimony relative to a divorce between these parties.

If the soldier was ever arrested and held on a criminal charge for bigamy in Schuyler County, N. Y., such fact must be shown by the record of the proper tribunal of said county before and in which such proceedings were had, or the absence of such record must be accounted for before the vague and indefinite recollection of witnesses twenty-five or thirty years afterwards could be heard or admitted in evidence.

But even if it were shown by the record that the soldier had been arrested for bigamy, as alleged, and had been discharged upon a preliminary examination upon the ground that he had been divorced from Mary C. it would amount to nothing, and would prove nothing in this case, when the records of the identical court in which it was alleged said divorce was obtained failed utterly to show that any such divorce had ever been granted or any suit for a divorce had ever been commenced by either of said parties therein.

It is true that the evidence shows that this appellant is a woman of bad and immoral character; that her original separation from the soldier was occasioned by her bad conduct, and that she has sustained immoral and licentious relations with other men, more or less continuously, from that time to the present, and it is more than probable, from the testimony, that she has forfeited her title to pension as the widow of the soldier under the provisions of the second section of the act of August 7, 1882, by her open and notorious adulterous cohabitation since the passage of said act and since the soldier's death; but this is a matter for after consideration upon the readjudication of her claim for pension, and has no bearing whatever upon the issue presented by this appeal, which is, solely and simply, Was her marriage to the soldier ever legally dissolved by divorce? In view of the considerations that have been herein pointed out, this question must, undoubtedly, be answered in the negative.

A perfectly legal and binding ceremonial marriage between the soldier and Mary C., this appellant, is established by the evidence and admitted by all parties. No legal dissolution of said marriage by divorce is shown, but the legal relation of man and wife thereby created

subsisted and existed between said parties not only at the date of the second marriage of the soldier to Samantha, but continued until it was dissolved by the death of the soldier, and this appellant, Mary C., is, in law, the widow of the soldier, and Samantha never was, under the law of the State of New York, the lawful wife of the soldier, and is not his widow, and can not lawfully be recognized or pensioned as such.

Therefore the rejection of this claim of Mary C. Orr for pension as the widow of said soldier, upon the ground stated, is hereby set aside and reversed, and you are requested to cause said claim to be reopened, reconsidered, and readjudicated upon its merits.

It follows, from the foregoing, that the action granting a pension to the second wife, Samantha, as the widow of said soldier should also be set aside, her present certificate canceled, and she be dropped from the rolls as having been erroneously pensioned, and you are requested to take such action.

Although the allowance of accrued pension and pension as widow to Samantha was erroneous and wholly unwarranted by the law and the evidence in this case, such error appears to be irremediable, since it does not appear that there was any fraud, misrepresentation, or bad faith on the part of Samantha in prosecuting her claim for pension as widow or procuring the allowance of accrued pension. The improper and erroneous allowance and payment of pension to Samantha was the result of an error of judgment and of law in the adjudication of these claims in the Pension Bureau, and, under the decisions of this Department, no recovery can be had from her to reimburse the Government for payments that have been erroneously made to her.

DESERTION—DISCHARGE—MILITARY AGE—ACT JUNE 27, 1890.

AURA HETHERINGTON (WIDOW).

A minor 18 years of age could, in 1861, enlist in the regular or volunteer service, and that prior to the act of May 15, 1872, such enlistment was valid without the written consent of parent or guardian.

Soldier enlisted June 1, 1861, in Company I, First Minnesota Volunteer Infantry, at the age of 19 years and 10 months. He deserted from said service June 19, 1861, and the charge of desertion has not been removed on the records of the War Department. While a deserter he again enlisted in Company H, First Minnesota Volunteer Cavalry, November 3, 1862, and was discharged November 24, 1863.

Held, That his first enlistment was valid and his desertion therefrom bars his widow's right to pension under the act of June 27, 1890. See the cases of John Norton (9 P. D., 382); Instructions to Commissioner of Pensions (4 P. D., 382); Susan Colgin (5 P. D., 127); James Cullen (6 P. D., 72); Kate Eibel (7 P. D., 179); Mary E. Walker (*ibid*, 197); Elizabeth J. Halfhill (8 P. D., 467); Bessie C. Wheeler (9 P. D., 155); Susan Williams (10 P. D., 82), and De Witt C. Nash (*ibid*, 141).

Assistant Secretary Webster Davis to the Commissioner of Pensions, October 31, 1899.

Aura, widow of James B. Hetherington, alias James W. Hetherington, late private Company I, First Minnesota Infantry, and Company

H, First Minnesota Cavalry, appealed by her attorneys November 21, 1898, from the Bureau action of February 11, 1898, rejecting her widow's claim No. 637629, filed July 20, 1897, under the act of June 27, 1890, on the ground that soldier was not honorably discharged from his former service in Company I, First Minnesota Infantry, but deserted therefrom June 19, 1861, as shown by the records of the War Department.

It is contended that soldier was a minor when he first enlisted and that therefore said first enlistment was void according to the decision in the case of Jasper M. Stine (9 P. D., 488). Also that the honorable discharge named in the act of June 27, 1890, referred only to legal services created by a valid enlistment.

The records of the War Department show that James W. Hetherington enlisted June 1, 1861, in Company I, First Minnesota Infantry, and deserted June 19, 1861; that he again enlisted under the same name in Company H, First Minnesota Cavalry, November 3, 1862, and was mustered out November 24, 1863.

The evidence shows that James B. Hetherington, whom it is assumed is the same person who enlisted under the name of James W. Hetherington, was married to claimant July 3 1867, and died June 27, 1891.

The only evidence of his age is shown by the testimony of two witnesses, who testify that he was born July 31, 1841. This would make his age over 19 years at the date of his enlistment, or 19 years 10 months and 18 days when he deserted eighteen days after his first enlistment.

The act of Congress of May 8, 1792 (sec. 1625, Rev. Stat.) provides that—

Every able-bodied male citizen of the respective States, resident therein, who is of the age of eighteen years and under the age of forty-five years, shall be enrolled in the militia.

Section 1642 provides that the President may—

call forth such number of the militia of the States * * * as he may deem necessary to repel * * * invasion or suppress rebellion.

Section 2 of article 2 of the Constitution provides that—

The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States.

Section 1644 provides that—

The militia, when called into the actual service of the United States, * * * shall be subject to the same rules and articles of war as the regular troops of the United States.

Under these laws the President issued his first proclamation of May 3, 1861, for volunteers, and under this call soldier first enlisted. Being over 18 years of age and an able-bodied citizen, he was subject to the call of the President, and could have been compelled to render military duty. The disobedience of an order of the President calling forth the militia renders a citizen liable to trial by a court-martial. *Martin v. Mott* (12 Wheat., 19); *Houston v. Moore* (5 Wheat., 1).

Having volunteered, he contracted to perform a military duty which

could have been legally enforced, and he could not repudiate the contract, by desertion or otherwise, on the ground that he was under 21 years of age.

As stated in the case of Jasper M. Stine (9 P. D., 488), prior to 1864 the minimum age of enlistment was 18 years, but the draft act of July 14, 1864, reduced the age of the recruit from 18 to 16 years. (See 13 Stat. L., p. 380, sec. 5.)

On May 15, 1872, Congress enacted that—

No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: *Provided*, That such minors shall have such parents or guardians entitled to his custody or control. (See 17 Stat. L., 117.)

I am therefore of the opinion that a minor 18 years of age could enter into a valid contract of enlistment in the United States regular or volunteer service in 1861, and that prior to the act of May 15, 1872, such enlistment was valid without the written consent of parent or guardian; that soldier's first enlistment and his desertion therefrom bars his widow from receiving a pension under the act of June 27, 1890.

The first condition of her title to pension under said act is that her husband shall have served ninety days or more in the Army or Navy of the United States during the late war of the rebellion and been honorably discharged, and it has been uniformly held by this Department that soldier must have been honorably discharged from all service contracted to be performed during the war of the rebellion to entitle him or his widow to a pension under the said act. See Instructions to Commissioner of Pensions by Assistant Secretary Bussey (4 P. D., 225); Susan Colgin (5 P. D., 127); James Cullen (6 P. D., 72); Kate Eibel (7 P. D., 179); Mary E. Walker (*ibid*, 197); Elizabeth J. Halfhill (8 P. D., 467); Bessie C. Wheeler (9 P. D., 155); Susan Williams (10 P. D., 82), and De Witt C. Nash (*ibid*, 141).

I am therefore of the opinion that the action appealed from was not error, and said action of rejection is accordingly affirmed.

FEE-ATTORNEYSHIP-LIMITATION.

JAMES ROSE (CLAIMANT).

MIL0 B. STEVENS & CO. (ATTORNEYS).

Where a pension claim has been rejected by the Bureau of Pensions and its action has been affirmed by the Department the claim is at an end, and the authority of the attorney is terminated. However, it is not necessary for said attorney to obtain a new power of attorney in his favor for the institution of new proceedings, provided the claimant cooperates with him therein, and has not in the meantime authorized another attorney to institute such proceedings.

Assistant Secretary Webster Davis to the Commissioner of Pensions, October 31, 1899.

Milo B. Stevens & Co., of Washington, D. C., April 25, 1898, entered an appeal from the action of the Bureau in the matter of fee on the

issue of July 25, 1894, in the claim for pension, under the general law, of James Rose, Company C, One hundred and sixty-second Ohio National Guard Volunteer Infantry.

Milo B. Stevens & Co., of Cleveland, Ohio, May 2, 1883, in behalf of the above-named soldier, filed a claim for pension under the general law in which rheumatism was alleged as a cause of disability incurred while in the service. The claim was rejected August 8, 1883, upon the ground of no ratable disability from date of filing claim. The appellants filed articles of agreement and filed evidence May 15, 1886, April 25 and June 27, 1887, and April 6, 1888. On April 14, 1889, they entered an appeal from the action of the Bureau rejecting the claim. Said action was affirmed by decision of the Department dated August 15, 1891. A copy of the decision was mailed to the appellant August 20, 1891. On March 22, 1892, they filed evidence.

R. A. Penn, of Massillon, Ohio, February 19, 1892, filed a power of attorney and evidence. He again filed a power of attorney on March 19, 1894, and filed evidence on August 10, 1892, and August 2, 1893.

On July 25, 1894, certificate issued to allow pension from date of filing on account of disability due to rheumatism. On said issue Messrs. Stevens & Co. were denied a fee; hence this appeal.

From the foregoing it appears that in view of all the evidence filed by the appellant the action of the Bureau was affirmed by decision dated August 15, 1891, and appellants were so notified. March 22 following, within a year, but after the lapse of three months, they filed evidence. They have been denied a fee upon the ground that they forfeited their rights by neglecting the case.

There is no specific rule applicable to the facts here arising. Rule 13 of the rules of practice provides for the filing of a motion for reconsideration in the Bureau. There is no rule relative to the time in which a motion for reconsidering a decision of this Department must be filed or for taking any other steps in order to preserve an attorney's rights. It may be contended that rule 12 of the rules of practice governs under the conditions above set forth, and that an attorney would be entitled to one year, unless a shorter time was prescribed by some other rule, in which to take proceedings looking to the further prosecution of a case. But I am inclined to the view that a decision of this Department, like that of any tribunal of last resort, is to be regarded as final, and that when the action of the Bureau rejecting a claim is affirmed by this Department for the time at least it must be considered that the claimant, under the law by which he seeks a pension, is without a pensionable status, and the claim is at an end. Further proceedings may be entertained, it is true, but such proceedings must be viewed in another light than as a continuation of those proceedings upon which the claim stood rejected.

It is within the discretion of the Secretary to review the case. Further proceedings in the claim are not entertained as a matter of right, or as of course. The claim, as viewed by the Bureau and by this

Department, is completed when the Department affirms the action of the Bureau rejecting it. Therefore it reasonably and necessarily follows that the rules of practice contain nothing as to the time in which further steps in the prosecution of a case must be taken. Proceedings in a claim that follow the affirmation by this Department of the rejection of a claim for pension by the Bureau are to be regarded as proceedings de novo, and in said proceedings the first attorney to file a valid power authorizing him to prosecute the claim for pension is entitled to recognition unless the claimant, subsequent to a decision of the Department affirming the action of the Bureau rejecting his claim for pension and prior to the appearance of some other attorney in the case, cooperates with the attorney of record.

In the particular case it appears that these appellants took no action in the claim until after another attorney had filed evidence of his authority to prosecute the case. They then filed evidence which may properly be considered as looking to the reopening of the claim. While this proceeding is proper, I am not of the opinion that the appellants' authority to prosecute the case was renewed thereby, or that they had any more warrant of authority to do this than to file a motion for reconsidering the decision of the Department, and which latter step depends upon the fact whether the claimant had seen fit to appoint another attorney. This he could do at any time subsequent to the disposition of the claim by the Department and before he again cooperated with the appellants.

Appellants were notified August 20, 1891, of the departmental decision. Mr. Penn filed a power of attorney and evidence February 19, 1892. The appellants filed evidence March 22, 1892. As Mr. Penn was the first attorney to commence proceedings de novo, he was entitled to recognition, and having prosecuted the claim to a successful issue without neglect on his part he was entitled to a fee.

As the appellants failed to secure the allowance of pension, action denying them a fee was proper.

Action affirmed.

DECLARATIONS—SUFFICIENT AVERMENTS.

WILLIAM H. HAGARTY.

A declaration for pension containing the necessary averments of facts is valid, although it may have been executed upon the same day of muster out, after the claimant has been discharged and is entirely severed, in fact and in law, from the service and is no longer subject to military duty or discipline.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
November 11, 1899.*

William H. Hagarty enlisted in Company D, First Illinois Infantry, April 26, 1898, in the war with Spain, and was mustered out of service November 23, 1898.

On the day of, but subsequent to, muster out he executed a declaration for pension, appointing Messrs. Charles and William B. King, of Washington, D. C., as his lawful attorneys in the prosecution of said claim. The attorneys filed the declaration in the Bureau of Pensions on November 28, 1898; whereupon they were informed that, "as the declaration was executed on a date prior to the time when title to pension accrued, it is held to be invalid and will confer no title." This action was apparently based upon departmental decisions in like cases.

The attorneys filed an appeal from said action on September 25, 1899, and as the question at issue had been ruled upon by the Department in other like cases, the case was referred to the Assistant Attorney-General for the Department on October 2, 1899, for his opinion.

His opinion was rendered on October 25, 1899, as follows:

WASHINGTON, *October 25, 1899.*

THE SECRETARY OF THE INTERIOR.

SIR: I am in receipt, at the suggestion of Mr. Assistant Secretary Davis, approved by you, of the papers in the pension claim No. 1212792, war with Spain, of William H. Hagarty, with request for an opinion as to the validity of a declaration executed by Hagarty the same day on which he was mustered out of the service of the United States.

It appears from the report of the War Department that Hagarty was enrolled as a private in Company D, First Illinois Infantry, April 26, 1898, and was mustered out of service November 23, 1898. On the last-mentioned date, but a few hours subsequent to his muster out, he executed, in due form, an application or declaration for pension, alleging service and discharge therefrom as above and that he was then "totally disabled from obtaining his subsistence by manual labor" by reason of the effects of "typhoid fever, resulting in impaired vision, rheumatism, disease of kidneys and liver, and heart trouble, and bowel complaint," contracted in the service and in the line of his duty. Five days later, November 28, 1898, the declaration was filed in the Pension Office. May 13, 1899, the declaration was by that office held to be invalid and to "confer no rights upon anyone, because it was executed on a date prior to the time when title to pension accrued," and a blank declaration was forwarded to the claimant for execution and filing. A second declaration was executed by him June 7 and filed in the Pension Office June 12, 1899.

The action of the Pension Office rejecting the first declaration filed by Hagarty appears to have been based upon a decision of the Department, dated March 29, 1899, in the case of William H. Walcutt, a claim for pension on account of disability alleged to be due to his military service in the war with Spain, wherein it was held that—

A declaration for pension executed before the right to receive pension accrues is absolutely void.

The decision in the case of Walcutt was cited with approval and followed in the case of George M. Hoffman (10 P. D., 268), decided by the Department July 14, 1899. In the case of Walcutt the declaration was executed January 9, 1898, eleven days before he was discharged from the service, and was filed in the Pension Office the day after his discharge. Hoffman's declaration was executed December 6, 1898, the day he was discharged, and was filed in the Pension Office two days later. It was alleged by Hoffman that his declaration was executed subsequent to his discharge, although on the same day, and such allegation was, in effect, accepted as true in the decision in his case.

It appears from the foregoing that the facts in the Walcutt case differ materially from those in the case at bar, but that the facts in the cases of Hoffman and Hagarty are essentially similar throughout.

An examination of the cases of C. D. Pennabaker (2 P. D., 257), H. S. Berlin (4 P. D., 97), and Timothy L. Carley (7 P. D., 12), cited in the Walcutt case, shows that none of them are in point in the case at bar. In the Pennabaker case the declaration was for pension under the act of January 29, 1887 (24 Stat., 371), and although filed after the approval of the act, was held to be invalid because executed prior to such approval. In the Berlin case declarations for pension under the act of June 27, 1890 (26 Stat., 182), executed prior to the approval of the act, but filed subsequently thereto, were held to be good and sufficient notwithstanding such prior execution. The Carley case was under the act of June 27, 1890. The declaration was executed and filed after the passage of the act. The questions considered related not to the validity of the declaration, but to the date of the commencement of pension.

In the case at bar pension, if allowed, can not commence prior to the date of filing the application (act of March 3, 1879, 20 Stat., 469). The allowance or payment of pension and pay for military or naval service, at the same time or for the same period, is prohibited, as set forth in the following provisions of law (sec. 4724, U. S. Rev. Stat., and act of March 3, 1891, 26 Stat., 1082):

"No person in the Army, Navy, or Marine Corps shall draw both a pension as an invalid and the pay of his rank or station in the service, unless the disability for which the pension was granted be such as to occasion his employment in a lower grade, or in the civil branch of the service.

"That hereafter no pension shall be allowed or paid to an officer, noncommissioned officer, or private in the Army, Navy, or Marine Corps of the United States, either on the active or retired list."

While these statutory provisions would seem to preclude, or at least to render ineffectual, the filing of an application for pension before discharge, and while the claimant could not well execute an application for pension before that time, for the reason that he could not truthfully allege discharge from the service, an item of proof essential to pension, there is no provision of law, express or implied, nor any official regulation, prohibiting the execution of an application for pension after discharge from the service, when all the facts necessary to be proven in order to entitle the applicant to pension may be truly alleged, even though such execution be on the same day as the discharge.

The facts that in law and practice parts of a day are not regarded in paying the soldier at discharge, and that pension may not be paid to include the day of discharge, furnish, in my opinion, no sufficient ground for the conclusion that a declaration or application for pension executed on the day of the applicant's discharge from the service, but after he has been discharged and is entirely severed, in fact and in law, from the service, and is no longer subject to military duty or discipline, is null and void. On the contrary, I am of opinion that such an application, duly executed and containing the necessary averments of fact, is valid.

Very respectfully,

WILLIS VANDEVENTER,
Assistant Attorney-General.

Approved.

E. A. HITCHCOCK,
Secretary.

OCTOBER 25, 1899.

It will be observed that the Assistant Attorney-General holds substantially that a claimant can not, under statutory provisions, execute a valid declaration while in the service, "for the reason he could not truthfully allege discharge from the service," but there is no provision of law, express or implied, prohibiting the execution of an application for pension after discharge, even though such execution be on the same day as the discharge, and that "such an application, duly executed and containing the necessary averments of fact, is valid."

This opinion has received the approval of the honorable Secretary, and has therefore become the departmental ruling upon the question at issue.

The action of your Bureau is accordingly reversed.

MARRIAGE OF SLAVES IN MISSOURI.

GARRISON PENNOYER (ALLEGED FATHER).

At the date of the alleged marriage of claimant to the mother of soldier in the State of Missouri both were slaves, and so continued up to the day of the mother's death in 1858.

Under the decision of the Supreme Court in the case of *Johnson v. Johnson* (45 Mo., 595), their alleged marriage was void.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
November 11, 1899.*

Garrison Pennoyer, alleged father of Garrison Lloyd, deceased, late private Company B, Eighty-third United States Colored Volunteer Infantry, appealed by his attorney March 28, 1899, from the Bureau action of February 10, 1899, rejecting his dependent father's claim No. 404034, filed September 7, 1889, under section 4707, Revised Statutes, and also from the action of same date rejecting his said claim filed July 26, 1890, under said section 4707, as amended by the first section of the act of June 27, 1890, on the ground that the soldier was not the legitimate child of claimant, the laws of Missouri regarding slave marriages having been passed long after the mother's death.

It is contended that as claimant was married to soldier's mother by Rev. Anderson Henderson, a Presbyterian clergyman, with the consent of their master; that he faithfully observed his marriage vows and lived with his wife until the date of her death, having seven children by her as the issue of said marriage, one of which, the oldest son, being the soldier; that it is error to hold that soldier was not his legitimate son; that claimant and his wife, while not permitted to learn to read and write, were permitted to attend church, and receive instructions in spiritual and moral truths, among which was the sanctity of the marriage relation, and the belief that they should be married under the blessing of God, that in fact the law permitted this, or rather did not deny it, and the master encouraged it in his own interests; that such marriages in Missouri and in the cotton States before the war were conducted with as much solemnity and sobriety as those in the higher walks of life; that under the laws of Missouri if the claimant should die leaving an estate his children would inherit, and to hold that because the mother died before the general assembly of Missouri had invested her with the rights of motherhood is utterly absurd and the refinement of cruelty; that no court, where the common law was the basis of jurisdiction, would render such a decision; that the records

of the courts of most States show that when no restrictive legislation is imposed, the common-law marriage is upheld and the rights of legitimacy enforced; that such marriages as this stands upon the broad and impregnable ground of a common-law marriage, which needed no legislation to enforce it; that having been married by a clergyman, with the full permission of their master, their children are certainly as legitimate as the animals that are carried on the herd books; and that it is against every legal and moral law to thus deny their right to enjoy the advanced legal rights that have resulted from the war.

Soldier enlisted August 14, 1863, and died in service March 28, 1864, leaving no minor child or widow.

His arrears of pay and \$200 bounty under acts of July 22, 1861, and July 28, 1866, were allowed and paid Garrison Lloyd by Treasury certificate No. 454111, issued June 26, 1868, upon satisfactory evidence to the Treasury Department as to the relation of soldier to the claimant therein, and of soldier's celibacy. Claimant refers to the evidence on file in that claim as proof of his relationship to soldier, and for the purpose of this decision Garrison Lloyd and Garrison Pennoyer are assumed to be one and the same person.

The evidence in that claim is not before me, and in view of the facts and the law in this case, I deem it immaterial, as this Department is bound by the act of August 7, 1882, to test the validity of claimant's marriage by the laws of the State of Missouri.

It is conceded by claimant that both he and his wife, the mother of soldier, were slaves at the date of their marriage in Missouri, in 1844, and so continued up to the date of her death in 1858 or 1860; that soldier was born in 1847, a slave.

Sections 2037 and 4705, Revised Statutes, relate only to the proof of marriage of the soldier, and proof of marriage of the parents of soldier is, by section 2 of the act of August 7, 1882, required to be "proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time of their marriage or at the time when the right to pension accrued."

Claimant's alleged marriage to soldier's mother took place in the State of Missouri, and claimant was residing in said State at the date of soldier's death, and when his right to pension accrued if he is shown to be the father of soldier. The word "father" is here used as it is construed to mean in section 4707, and embraced in the word "parent" as used in section 1 of the act of June 27, 1890, amendatory of said section 4707, viz, the legal father or parent. Legitimacy is prerequisite to a legal title to pension. (See cases of Hartwell Trickey, 8 P. D., 84; William Toller, 7 P. D., 545; reaffirmed in 10 P. D., 75; Marie L. Boss, 10 P. D., 36; Maria Merritt, *ibid*, 157; Jonas W. Pulver, *ibid*, 227; Amanda Fane, *ibid*, 254.)

The exceptions to this general rule are cases of a dependent mother. (See case of mother of Patrick Bush, 5 L. B. P., 140, cited in Digest of

Pensions of 1897, p. 147, and cases arising under section 4704, Rev. Stat.)

The case under consideration falls within neither of these exceptions. The marriage referred to in said section 4704, Revised Statutes, means a legal marriage. (See cases of *J. F. Kinney*, 4 P. D., 132; *Elizabeth Felber*, *ibid.*, 329; *George and Albert Koler*, 5 P. D., 99; *Emma Gierhart*, 6 P. D., 155; *Ida M. Downard*, 7 P. D., 290.)

Under the pension laws, this Department has no discretion in the matter involved in this case, but is, by the plain language of the statute, required to test the question of the validity of the alleged marriage by the laws of the State of Missouri.

No laws or decisions of the courts of that State are cited by claimant's attorney in support of his contention as to the validity of said marriage or the legitimacy of soldier.

On the contrary, the supreme court of that State appears to have passed directly upon the question of the invalidity of such slave marriages as the one under consideration in this case.

In the case of *Sinai D. Johnson v. Demas Johnson* (45 Mo., 595), decided by the supreme court of Missouri in 1870, the court held that slave marriages had no legal validity, citing *Howard v. Howard* (6 Jones, N. C., 235), *Malinda v. Gardener* (24 Ala., 719), *Girod v. Lewis* (7 Martin, La., 559), and *Bishop on Marriage and Divorce*, paragraph 156.

The court conceded that with the consent of their masters slaves might marry, and that their moral power to agree to such a contract could not be doubted, but in a state of slavery it could not produce any effect, because slaves were deprived of all civil right.

On February 20, 1865, the legislature passed an act in relation to the marital rights of colored persons and their children. (See *Laws of Missouri*, 1865, p. 68.)

This act provided that all persons of color heretofore held as slaves in said State who had cohabited together as husband and wife should appear before a justice of the peace, or some officer authorized to perform the marriage ceremony, and be joined in marriage by ceremony, a record of which was to be returned to the county recorder, and a failure to comply with this statute was punishable by a penalty of \$50. It also required them to give the names of their children.

This act was held to have no application in the case of *Johnson v. Johnson* (*ibid.*), as the parties never cohabited together after the act became operative.

Neither does said act make a provision for legitimizing the children of slave marriages, but merely provides that a record shall be made of their names.

In the case of *Johnson v. Johnson*, above referred to, the question of slave marriages appears to have been squarely presented and considered, and in the absence of any conflicting decision of said supreme

court it must be deemed by this Department to be the law of that State upon the subject.

The court conceded in that case that—

The slave, in entering into marriage, did a moral act; and although not binding in law, was no violation of any legal duty. If, after the emancipation, there was no confirmation by cohabitation or otherwise, it is obvious there would be no grounds for holding the marriage subsisting or binding. As in the case of other parties incapacitated, we perceive no good reason for holding that the contract may not be assented to and ratified after the incapacity or disability is removed.

The Missouri court cited with approval the decision of the supreme court of Louisiana in *Giard v. Lewis* (7 Martin, 559), in which the court held that it was clear that slaves had no legal capacity to assent to any contract; that with the consent of their masters they might marry, and their moral power to agree to such a contract or connection as that of marriage could not be doubted; but in a state of slavery it could not produce any effect, because slaves were deprived of all civil rights, their rights being dormant during slavery.

Applying the law of Missouri to the facts alleged as to the marriage of claimant to the mother of soldier, it follows that it is impossible for claimant to establish a legal marriage under the laws of Missouri, and thus establish his title to pension as the dependent father of the deceased soldier.

For the purposes of this decision the facts as to his alleged marriage are assumed to be as testified by claimant.

The action appealed from is accordingly affirmed and the papers in the case are herewith returned.

DECLARATIONS—ACT JUNE 27, 1890—AMENDMENTS.

TONY HUDSON.

When a claimant for pension under the act of June 27, 1890, in the language of the act alleges in his declaration that he served ninety days or more in the military or naval service of the United States during the late war of the rebellion, and was honorably discharged; that he is suffering from a mental or physical disability of a permanent character, not the result of his own vicious habits, which incapacitates him from the performance of manual labor in such a degree as to render him unable to earn a support, it is such compliance with all requirements of the law as must entitle the claim to consideration, notwithstanding the specific cause of disability is not named; and it is, therefore, hardly necessary that the widow of a deceased applicant for pension under the second section of said act should file an amendatory affidavit covering the disabilities shown upon examination, unless it be to designate their duration.

*Assistant Secretary Webster Davis to the Commissioner of Pensions,
November 11, 1899.*

This motion, entered September 15, 1898, seeks the reconsideration of a decision rendered September 12, 1896, whereby the action of the Bureau in rejecting the claim, under act of June 27, 1890, of the above-

named soldier was affirmed. The rejection was upon the ground that the evidence failed to establish the existence of his incapacity for earning a support by manual labor due to the only cause alleged by him, viz: bronchitis.

The decision complained of, and hereto attached, points out the lack of all evidence to show that soldier was in any manner disabled by bronchitis. It also shows that whatever disability he had was due to other causes not alleged, and he being dead, it was not possible for an amendatory declaration, alleging such other causes, to be filed. So that any other disability than bronchitis could not be considered in determining the right to pension under said act.

The contention of the present motion is that the construction of the law and the rules of practice as embodied in the enunciations of that decision have been changed so as to allow a widow to file an amendatory declaration in such a case as this. It is, therefore, requested that the claim be reopened for the purpose of allowing the widow of this soldier to file such amended declaration as he might have filed if alive, alleging any and all disabilities necessary to meet the requirements of the case.

There can be no question but the decision complained of was in conformity with the rulings of the Department at the time it was rendered. Under the construction then prevailing the applicant for pension under the second section of the act was required to allege specifically the disability from which he claimed to be incapacitated for earning his support by manual labor. But this construction has been changed by my instructions of July 28, 1897 (9 P. D., 93), wherein it was declared that the omission of an essential averment should not invalidate the application for pension, but the defect might be remedied by a supplemental affidavit which would serve as an amendment; and that a declaration in the terms of the act shall be sufficient. Thus, although the soldier alleged bronchitis only as the cause of his incapacity, such allegation is subject to amendment, under said ruling, so as to include all disabilities from which he may have suffered.

This being true, the question arises, may the widow file such amendment? Formerly it was held that she could not, but that her title to accrued invalid pension rested alone on the claim made by the soldier while living. But this ruling has been likewise changed to the extent that she is held to succeed to all the rights of the soldier during his lifetime, and that whatever he may have properly done in connection with his pending claim she may do in his stead. In a decision rendered December 15, 1897, in the case of William H. Hughes, deceased (9 P. D., 152), it was held that the Department was without authority to make a rule limiting the time within which an appeal might be filed in any case. In the course of the decision the following language was used:

The right of a widow of a soldier who had made a proper application for a pension to complete his claim has never been questioned, but she has uniformly been denied the right to set up a new claim in her deceased husband's case after his death.

In a soldier's claim in process of adjudication in your Bureau, when the claimant died the widow has been accorded the right to do anything in the claim that her deceased husband could have done had he been living. In other words, under section 4718, Revised Statutes, and the act of March 2, 1895, she succeeded to his rights, not only to receive the pension when granted, but to prosecute the claim to a final adjudication.

From this statement it is apparent that this claimant may file any supplemental affidavit that the soldier could have filed, that any amendment or allegation permissible to him may be filed by her, provided a new claim or cause of action is not set up.

But, aside from this view of the matter, which recognizes the appellant's right to amend the invalid claim by alleging other disabilities from which soldier suffered, it may be pointed out that the necessity for the allegation of specific disabilities, either originally in the declaration filed or as an amendment in a supplemental affidavit, by the soldier or the widow, is substantially done away with by the instructions before mentioned. The first of these ends with a proviso in these words: "That a declaration in the terms of the act shall be sufficient." When, therefore, a claimant, in the language of the act, alleges in his declaration that he "served ninety days or more in the military or naval service of the United States during the late war of the rebellion, and was honorably discharged; that he is suffering from a mental or physical disability of a permanent character, not the result of his own vicious habits, which incapacitates him from the performance of manual labor in such a degree as to render him unable to earn a support," it is such compliance with all requirements of the law as must entitle the claim to consideration, notwithstanding the specific cause of disability is not named. It will be understood, of course, that the proof must sustain the allegations, and this will render necessary the establishment of the nature and degree of each specific disability and whether existing at the date application was made.

Taking all these considerations together, then, it is hardly necessary that the appellant should file an amendatory affidavit covering the disabilities shown upon the special examination of the case unless it be to designate their duration, and since, under the instructions, the original ground of rejection is no longer tenable, it would seem that the only proper course is to reopen the claim and readjudicate it upon its merits, giving due recognition to all disabilities proven.

The former decision is accordingly set aside and the papers are returned for the action thus indicated.

INSANE OR HELPLESS MINOR—ACT JUNE 27, 1890.

MINOR OF PHILIP J. CONKLIN.

The evidence shows that the claimant, by reason of mental infirmity, is incapable of the intelligent pursuit of any vocation, or of obtaining remunerative employment.

Held, That she has a pensionable status as an insane or helpless minor under the act of June 27, 1890.

Assistant Secretary Webster Davis to the Commissioner of Pensions, December 2, 1899.

Philip J. Conklin, late of Company F, Eighteenth Michigan Infantry, died on January 8, 1864, leaving a widow and a minor child under the age of 16 years. Said widow, Chloe D. Conklin, in behalf of herself and minor child, Ida M. Conklin, was pensioned under the general law from the date of soldier's death, until the said minor reached the age of 16 years on April 7, 1875, and for herself until she was remarried on September 5, 1880.

On September 15, 1897, the mother, now Chloe D. Auble, as guardian of said Ida M. Conklin, filed a declaration for continuance of said pension for the benefit of the latter, alleging that she is permanently helpless within the meaning of the act of June 27, 1890.

This claim, designated by number 642874, was rejected on March 25, 1898, on the ground that the claimant is not insane, idiotic, or otherwise permanently helpless as contemplated by the statute.

Assigning said action as error, appeal was taken on April 22, 1898, contending that it is shown by the evidence that claimant is permanently helpless within the meaning of the law.

A certificate of medical examination made by an examining surgeon at the home of the claimant's mother on February 28, 1898, describes the following objective conditions:

Pulse rate, 110; respiration, 22; temperature, 98½; height, 5 feet 2 inches; weight, 175 pounds; age, 38 years. The physical appearance of this woman is good, nutrition good, appearance healthy. She is an imbecile, but talks with some degree of intelligence; can do some little work about house by being overlooked all the time. This is a permanent condition, but she is not strictly idiotic or insane, although her mother claims she has very marked nervous spells which increase her mental disturbance. I believe she could have come before the board if she had had some one to bring her, although her mother claims she becomes very nervous and hard to manage away from home. She is not at all capable of self-support, and grows less so every year.

On October 25, 1897, was filed an affidavit of Hiram G. Brittain, who had lived neighbor to claimant's mother from 1866 to 1880, and saw claimant daily, in which he says:

The said child during all of that time was not capable of taking care of herself or of doing anything without being directed by someone, and was mentally incapable of learning anything. Whatever she did was mechanical only, and she had no mind to speak of, and required constantly someone to have her in charge and to take care of her.

In support of the claim was filed the affidavit of Elizabeth Brittain, whose testimony is substantially the same as that of Hiram G. Brittain. The witness says:

She did not have mind enough to do anything without some one standing over her and constantly directing her. She did not have mind enough to do even the most trivial kinds of work except under constant direction of some other person, and would then be unable to remember how to do the same thing again without again being directed.

Sarah J. Markel, by affidavit filed on October 25, 1897, testified as follows:

I have been acquainted with said child, Ida M. Conklin, ever since she was a little child of five or six years of age. Her mental condition at that time was such as that she was not capable of taking care of herself in any degree—no more than a child of a year or eighteen months of age. From the time I first saw her, which, as near as I can fix the time, was about 1865 or 1866, up to the time she left Bryan, Ohio, with her mother, said guardian, which, as I am informed, was about 1880, I saw the child as often as, perhaps, on an average once a week, and there was no change in her mental condition for the better. She grew in size, but her mind was during all of said time the mind of a baby or no stronger than that of a baby.

On June 29, 1897, was filed a joint affidavit of Emma A. Greenwood and Rhoda Culver, each of whom had known the claimant for a number of years, who state that for seven years she was an inmate of an institution for imbeciles in Columbus, Ohio, and that she is still unable to do any kind of work and is incapable of keeping her person in proper condition.

On June 29, 1897, was filed an affidavit of Dr. Shoemaker, who deposes to the effect that he had known the claimant about one year and had had some opportunity of observing her mental and physical condition; that she is large of body, slow and sluggish in her movements, with abnormally large head; that her countenance is apathetic, eyes dull, slow of speech, and dull of comprehension. At times any attempt to control her provokes a violent outburst of passion; that her memory is poor, and she is incapable of doing anything that requires a little skill or the exercise of judgment, such as baking, etc.

The mother and guardian of the claimant testifies that she (deponent) has always cared for and provided for the claimant with her own hands, and is now, by reason of failing health, unable to do so any longer.

Under the facts above set forth the question arises, is the claimant permanently helpless within the meaning of the act of June 27, 1890? It will be observed, from the terms of the statute, that the condition described above may result either from physical or mental causes, or both. The real question in this case involves an inquiry as to whether the claimant is affected with a degree of mental impairment which works a resulting incapacity for the intelligent performance of manual labor. If the evidence furnished in support of the claim is reliable, and it is uncontradicted, the claimant, who is now 38 years old, has never been possessed of sufficient intelligence to perform manual labor

without the direct supervision and direction of another person. If she should be bereft of the aid and assistance of all persons who are bound to her by ties of consanguinity or affinity, and that is a legitimate standpoint from which to consider her pensionable status, her chance for earning her bread by the sweat of her brow would be well nigh hopeless. The examining surgeon states that she is not at all capable of self support, and the physician that has opportunities for observing her physical and mental condition testifies that she can intelligently do nothing which requires a little skill and judgment, such as baking, etc. Another witness testifies that she is incapable of learning, and states that her intelligence is not greater than that of a child 18 months old. It appears that she has never supported herself, but has been entirely dependent upon her mother for sustenance.

The claimant seems to be endowed with bodily strength and physical vigor; but she is also a penniless imbecile, a condition which, in the practical affairs of life, shuts out all hope of remunerative employment. It is absurd to suppose that anyone would give employment to such a person as required the constant aid and direction of another person. Mind and body must cooperate in the performance of any character of manual labor, and where the strength and muscle of one person must be guided and directed by the mind of another it is the same as the employment of two persons to do the work of one. It seems to me to be in harmony with the letter and spirit of the law to affirm that one who is without means of support and, by reason of mental infirmity, incapable of the intelligent pursuit of any vocation or of obtaining any remunerative employment is permanently helpless.

The action complained of is therefore reversed, with directions that the case be readjudicated in accordance with this opinion.

LINE OF DUTY—UNDERGOING PUNISHMENT.

SARAH J. HAWKINS (WIDOW).

As soldier's death cause was contracted while he was under arrest and confinement under sentence of a court-martial on a charge of exciting mutiny, his widow is not pensionable for the reason that said death cause was not incurred in the line of duty.

Secretary E. A. Hitchcock to the Commissioner of Pensions, December 5, 1899.

Perry Hawkins, a private in Company B, One hundred and sixteenth United States Colored Volunteer Infantry, enlisted on July 2, 1864, and died on September 20, 1865, during the period of his military service in the Corps de Afrique General Hospital, located in the city of New Orleans, La. A report from the Adjutant-General shows that the soldier died from the disease of chronic diarrhea.

On January 6, 1890, his widow, Sarah Jane Hawkins, now Thomas,

filed a declaration for widow's pension, designated by number 412227, under the provisions of the general law, alleging that her said husband died of a disease contracted during the period of his military service, while he was in the line of duty. Her claim was adjudicated by the Bureau of Pensions on June 27, 1898, and rejected on the ground that the fatal disease of chronic diarrhea is not shown to have been incurred or contracted by the soldier while he was in line of duty.

Assigning said action as error, appeal was taken on August 4, 1898, resting upon the contention therein presented, that the soldier at the time of enlistment was examined by a medical board and accepted into the service of the United States as a sound man; that he served faithfully and well until stricken down with said fatal disease, on account of which he was sent to the hospital, at which institution he died, as hereinbefore stated; that it is manifest from the evidence that soldier contracted said disease in the service of the United States and in the line of duty, by reason of which the claimant is pensionable under the provisions of the general law.

Pending this appeal the claimant on April 13, 1899, filed the additional evidence of one witness, William Ballard, as a basis for reopening her said claim. Upon the consideration of said additional evidence on November 3, 1899, it was held by the Bureau of Pensions that the same was not deemed sufficient to warrant a reopening of the claim, for the reason that it is too general and indefinite to establish origin of the fatal chronic diarrhea in the line of duty.

From this last-mentioned action a second appeal was filed on November 20, 1899, resting upon substantially the same assignments of error as are embodied in the first appeal.

Under the provisions of the general law the widow's right to pension is conditioned upon and determined by what would have been the pensionable status of the soldier had he survived.

The status of the soldier is fixed by the provisions of section 4693, Revised Statutes, by virtue of which an enlisted man may become a beneficiary who is disabled by a disease contracted or injury received "while in the service of the United States and in the line of duty."

It is not denied that the soldier in this case was a sound man physically at the date of his enlistment, or that he died in service of chronic diarrhea, a disease contracted during the period of his enlistment. The issue raised by the appeal, therefore, is limited to an inquiry as to whether the fatal disease was contracted while in the line of duty.

It appears from the evidence in the case that the soldier was placed under arrest on May 11, 1865, under the charge of "exciting mutiny." The facts upon which the charge of exciting mutiny were based are set forth in an affidavit of William Stagers, filed on February 24, 1891, as follows:

Perry Hawkins was the ringleader in a mutiny, and he, with other members of the regiment, released a prisoner who was under arrest, and would not desist when ordered so to do by his superior officers. He was, however, overpowered and taken

to the guardhouse, tried by court-martial, and sentenced to the penitentiary for eighteen months.

On November 8, 1871, there was procured from the Adjutant-General's Office a copy of the order promulgating the charge, finding, and sentence of a general court-martial dated August 16, 1865, which is as follows:

Private Perry Hawkins, Company B, One hundred and sixteenth United States Colored Infantry.

Charge, exciting mutiny.

Finding, guilty.

Sentence, to be confined at hard labor for the term of eighteen calendar months, at such place as the commanding general may direct, with the loss of all pay and allowances now due or to become due him during that period, and to wear a ball weighing 12 pounds attached to his left leg by a chain 6 feet long while so confined.

To undergo his sentence the soldier, with others, was ordered to be sent by the provost-marshal to the Dry Tortugas, Fla., that place having been designated by the commanding general for such purposes.

The medical records on file in the Record and Pension Office of the War Department show that soldier received medical treatment in the general hospital at Camp Nelson, Kentucky, from July 25 to September 2, 1864, for measles, and that he was treated in the post hospital at Brazos Santiago, Tex., from July 10 to August 2, 1865, for scorbutus. A report from the Surgeon-General's Office shows that soldier was admitted to Corps de Afrique General Hospital, the institution in which he died, on August 5, 1865, to receive medical treatment for scurvy, and that he died on the 20th of September thereafter of chronic diarrhea.

Cyrus Ballard, a lay witness and comrade, testified to the effect that he first met the soldier in Camp Nelson, Kentucky, in 1864 (the date is not mentioned), at which time he was a stout, healthy man, and, so far as witness knows, was in that condition up to the time of his arrest, about May, 1865.

The witness does not know whether soldier was affected with diarrhea, rheumatism, or scurvy.

William Stagers, a comrade, testified by affidavit to the effect that he was away from the company much of the time and knows but little of soldier's physical condition prior to his arrest; that he does not remember that soldier suffered from diarrhea, scurvy, or rheumatism, but he might have had any or all of those troubles without the knowledge of the witness.

William Ballard, the witness who made the affidavit relied upon by the claimant as a basis for reopening her claim after rejection, testified as follows:

I remember Perry Hawkins, deceased, who was a private of the same company. After the war of the rebellion had ended in 1865 our regiment was still held in the service, and we, with some others, were sent to Texas. While there Perry Hawkins took a severe weakening bowel trouble, which, I think, was chronic diarrhea, and of which he died. I think it was in the fall of 1866, but the exact date I can not tell. We had some cases of cholera in the regiment, but I am certain that the

chronic bowel trouble, which above I have called chronic diarrhea, was incurred by the said Perry Hawkins while in the United States service and in line of duty. Hawkins died at what was called "White Ranch," in the State of Texas. My knowledge of the above facts was obtained by my having served as a sergeant in Company B, One hundred and sixteenth United States Colored Troops, and being present at the time and from my own personal knowledge.

The same witness, who signs his name William Greene, alias Ballard, in response to a letter of inquiry addressed to him by the Commissioner of Pensions touching his personal knowledge relative to the incurrence of any disease by the soldier during his military service, wrote on July 26, 1897, as follows:

In reply to your request I have to state that I knew Perry Hawkins while in the United States Army. He was afflicted with scurvy while in the service, and died of cholera at White Ranch, Texas. He and I belonged to the same company.

The witness, Ballard, also made an affidavit in support of the claim on July 22, 1865, in which he deposed as follows:

That I was well acquainted with Perry Hawkins; * * * that at the time of his enlistment said Perry Hawkins was an able-bodied man, so far as I ever knew, and while in the military service of the United States, on or about the 10th day of September, 1865, at New Orleans, in the State of Louisiana, died while under sentence of court-martial, charged with exciting mutiny. I know of his death by general report in the company, and I give the dates and place of death from an old history of said regiment.

Ballard is the only witness who has testified that the soldier contracted the disease of chronic diarrhea during his military service, and, if free from all other infirmities, his testimony would be valueless in this case for the reason that it does not appear therefrom whether the said disease was contracted prior to or subsequent to soldier's arrest in May, 1865, for exciting mutiny. In his original affidavit, made in support of the claim in 1895, he made no mention of any disease as the cause of soldier's death, and substantially disclaimed any personal knowledge of the facts to which he testified by stating that he based his information upon general report and an old history of the regiment. In 1897 he wrote to the Commissioner of Pensions that the soldier died of cholera at White Ranch, Texas. Subsequent to the rejection of the claim, said witness made another affidavit to be offered as a basis for reopening the same, in which he deposed that soldier contracted the disease of chronic diarrhea in the service, of which disease he died at White Ranch, Texas, and claims to have been present at the time, having personal knowledge of the facts to which he testified. The record history of soldier's fatal illness and death, as embodied in the report from the War Department, as well as the original affidavit of the witness himself, shows that the testimony contained in his last affidavit is untrue. There is, therefore, no evidence that soldier contracted the fatal disease prior to his arrest. The records of the hospital in which the soldier died show that he was admitted into that institution to receive medical treatment for scurvy, a fact which indicates that he was not at that time affected with chronic diarrhea.

The material and controlling question in this case then arises, would the soldier, had he survived, have been pensionable by reason of a disease contracted while under sentence of a court-martial for having violated a military law?

It has been frequently held by the Department that an injury received or disease contracted under such circumstances confers no pensionable status upon a soldier.

In the case of the widow and minors of Vandergriff (5 P. D., 151) it was held:

Disabilities incurred by a soldier while undergoing punishment for an offense against the rules of the Army are not ascribable to the line of duty for pensionable purposes.

In the case of George East (5 P. D., 243) it was held that—

A disease contracted as the result of confinement in a military prison was not contracted in the line of duty.

In the case of Caroline Chollar (4 P. D., 103) it was held that—

If a soldier is arrested and imprisoned on a charge, but on trial is adjudged not guilty, a disease incurred during his arrest and imprisonment is within the line of duty, but if adjudged guilty, such disease would be without the line of duty and nonpensionable.

The action complained of is without error and is hereby affirmed.

APPEALS—PRACTICE.

ARCHIBALD F. THOMAS.

Where more than one claim by the same claimant is involved in an adjudication an attorney in his appeal must specify which claim he desires reviewed.

*First Assistant Secretary Thomas Ryan to the Commissioner of Pensions,
December 16, 1899.*

The above-named appellant, by attorney, filed a long appeal on March 21, 1898, in which he stated that he had "filed several claims and had been examined a number of times." He mentioned no claim specifically, and he gave no dates. Twelve days after the filing of the appeal he filed a new declaration, and in considering this appeal on review you advised the Secretary "that the action appealed from is not adhered to, and that the claim has been reopened for further consideration upon the filing of a new declaration covering the point appealed on." Upon this statement the appeal was properly dismissed. It appears that action was had upon this new declaration, filed April 2, 1898, on July 6, 1899, a rating of \$6 per month being allowed on disease of digestive organs and general debility, to commence from April 2, 1898. Under the statement made by you the appeal was, as stated, properly dismissed; but it appears that instead of reopening, under the action appealed from, you simply took action under a new declaration

filed after the appeal was entered. The result is that claimant now, on August 10, 1899, files a motion for reconsideration, claiming that the appeal was improperly dismissed. In the light of what has since been done it would appear that the attorney's point is well taken; but there is still another feature of the case, by reason of which the attorney has contributed not only to leading the Commissioner of Pensions, but the Secretary as well, into error. And this feature is not confined to the attorney herein, but is a common one in the appeals of a vast number of pension claims. It is this: That many claimants and attorneys in entering appeals, when they have had more than one claim rejected, neglect to state what claim they refer to or from what action they appeal, leaving it purely guesswork on the part of the Secretary as to what action they desire reviewed by him.

The within case is a good illustration of the above statement. Claimant filed four declarations under the act of June 27, 1890, between August 28, 1890, and December 12, 1896, every one of them being rejected on different dates on account of no ratable disability, and he then filed an appeal, without mentioning a single one of those claims by date; neither did he give any data of any nature whereby it could be possibly determined as to which claim he referred. The Secretary, in the light of the facts then before him, dismissed the appeal because the Commissioner of Pensions had advised that the action appealed from was not adhered to. The Commissioner of Pensions was, however, entirely in the dark as to what action was appealed from.

Now, in his endeavor to straighten out the matter and to specifically mention the action appealed from, the attorney, in his motion, states "his appeal was from the rejection of March 21, 1898," when, as a matter of fact, there was no rejection or action of any kind taken by the Commissioner of Pensions on that day, said date being only that on which attorney filed his appeal with the Secretary.

When the attorney advises this Department as to which claim he desires reviewed, such an appeal will receive consideration, but until then the actions will stand, for lack of information as to claimant's desires in the matter. Having been led into one error through the negligence and carelessness of the attorney, the Secretary declines to lay himself liable to commit another by the same means.

In view of the above practice, it may be stated that if claimants or their attorneys have not the data necessary for the proper appeal of a case such data is easily obtained. The practice referred to puts upon both the Commissioner of Pensions and the Secretary a vast amount of unnecessary labor, occupies valuable time which should be devoted to the consideration of appeals properly drawn, and leads this Department into error, all of which could be easily remedied if the appellants would avoid being negligent and careless and take some little pains to acquaint themselves with the necessary facts on which to base an appeal.

In order that the chance of error may be reduced to a minimum, it is hereby held:

If more than one claim has been rejected, or more than one action taken on the same claim, and if the claimant, in appealing by or through his attorney, fails to state the specific actions appealed from, or does not give in his appeal the proper data or facts from which it can be determined, with a reasonable degree of certainty, as to what specific action is appealed from, the appeal will be dismissed.

The within motion is hereby overruled.

LINE OF DUTY—POISON—WOOD ALCOHOL.

JOSEPH E. HENDRICKSON.

Appellant is shown to have become totally blind in both eyes while in the service. Blindness developed soon after the ingestion of a poisonous quantity of wood alcohol. At the same time the soldier was convalescing from pneumonia, which was complicated by malarial fever.

The evidence on file warrants the conclusion that the total loss of vision in this case was due to wood-alcohol poisoning and not to malarial poisoning, as alleged.

Assistant Secretary Webster Davis to the Commissioner of Pensions, October 31, 1899.

This appellant, Joseph E. Hendrickson, late a private of Company F, First District of Columbia Volunteer Infantry, war with Spain, filed on November 21, 1898, a claim for pension (numbered 1211918).

It is set forth in his declaration—

That while a member of the organization aforesaid, in the service and in the line of duty at Santiago de Cuba, on or about the 26th day of July, 1898, he contracted what was known as mountain fever, which was followed by dysentery, which was followed by pneumonia, and finally by loss of sight of both eyes; that his sight began to fail him while in bed with pneumonia, and that he has been totally blind since.

A legal approval was made June 2, 1899, for "malarial poisoning and loss of sight of both eyes. Dysentery and pneumonia referred to medical referee for rejection; not examined therefor, and would not affect rate. All disability the result of alcohol to be eliminated by the medical referee."

The claim was rejected July 20, 1899, on the ground of—

No ratable disability from malarial poisoning, dysentery, pneumonia, or loss of sight of both eyes shown since filing claim excluding total blindness due to ingestion of wood alcohol.

From this adverse action an appeal was entered August 17, 1899.

The records of the War Department show that the claimant was mustered into the service May 10, 1898, and mustered out November 10, 1898, and further state:

The muster-out roll shows him sick in quarters July 28, 29; August 19, 21, 1898, inclusive, all in line of duty. The certificate of the surgeon on the final examina-

tion shows: "Atrophy of nerve (optic) due to rupture of blood vessels left eye—total blindness at present, right eye—perception to light. (The above is according to statement of man, who states Dr. Wilmer treated him). Slight bronchial condition. Irritable heart, varicose veins of lower extremities due to condition previous to enlistment."

Disability originated in line of duty. Became blind while sick at Washington, D. C., in September, 1898, believed to have been incurred from climatic condition in Cuba.

The records further show him treated "July 28 to 30, 1898, intermittent fever, in line of duty; returned to duty."

He was first medically examined under his claim December 12, 1898, by an expert (specialist), who reported, in reference to the eyes, as follows:

External appearance of both eyes apparently normal except a slight conjunctivitis and marked dilatation of pupils. Cornea clear. Pupils round and dilated ad maximum. No evidence of iritis. Media clear. Optic nerve of each eye shows advanced atrophy. Choroid congested in both, with a beginning patch of choroidal atrophy in O. S.

In in both. No pain alleged, but has flashes of light in O. S.

V. O. D. P. L. Nil.

V. O. S. P. L. Nil.

No evidence of specific disease discovered. A few superficial scars over spine, and one over right shoulder from alleged boils in early life.

The certificate was amended February 11, 1899, as follows:

The optic disks showed white atrophy, almost chalky white. The margins of the disks, as now recalled, were well defined, and no evidence of hemorrhage except the general choroidal congestion with the small patch of choroidal atrophy in the left eye. The retinal vessels had not apparently undergone much change. The duration of the atrophy can not be definitely stated, but from the history of the case it had not been more than a few months.

The case was referred for special examination for the reason—as set forth in the slip of the Bureau, dated January 10, 1899—

That the only disability shown by the medical records in the case prior to condition shown on final examination (on muster out), is "intermittent fever," and history of origin given, it appears that while on furlough and under treatment for fever, other disabilities intervened and finally the condition of the eyes shown developed. * * *

It appears that in compliance with this request the claim was investigated by a special examiner.

The claimant testified, January 20, 1899, before the special examiner, that prior to his enlistment his profession was that of a dentist, and he is an applicant for pension on account of total blindness, "a result of exposure and hardships and of heat prostration."

He stated further that this heat prostration occurred in the latter part of June, while on a practice march at Tampa, Fla. That permission was given him to drop out of ranks, and that upon reaching the sidewalk he lost consciousness. When he regained consciousness he proceeded to the hospital, where he received treatment. Late in the evening he was permitted to go to his company street.

His second illness occurred in Cuba. The symptoms developed while he was on guard duty; was taken with violent pains in his limbs; did not give up his post, but completed his tour of duty; was sick with fever in quarters five days on this occasion.

Some time subsequent to this illness, while in charge of a Spanish prisoner, he became exhausted, and at this time there was a "mist" in front of his eyes. He also stated that a second attack of the fever occurred just before his embarkation on board the transport to return home. While on said transport he was in perfect health, and also after his arrival at Montauk Point. He was next taken sick on September 9, at Wilmington, Del., on the train for home. The nature of his sickness was dysenteric. On his arrival at Washington he did not notice any trouble with his eyes. When he arrived home he was "put to bed and the doctor sent for." He thinks this spell of sickness lasted over two weeks; that while convalescing he remarked to his wife that he "guessed he would have to get glasses; that the lines seemed to run together while reading."

He was up and out of the house for two days, when he was again taken sick, this time with pneumonia and malarial complications.

In reply to the question of the special examiner as to when the trouble with the eyes first became marked, he stated:

The 5th day of October. * * * The first realization that I was losing my sight that I had was on the morning of the 5th.

In answer to the question, "Did you have any treatment for your eyes that day?" he replied: "Dr. Freer that day gave me medicine which was supposed to counteract what he presumed to be temporary effects."

He was first placed under the treatment of an oculist, Dr. Wilmer, on the Monday after the 5th of October; October 10.

The claimant made the following statement in reference to the said treatment:

The original treatment of Dr. Wilmer was 1-100 of a grain of strychnine three times a day, with one drop of the iodide of potassium, which was subsequently increased to 1-10 of a grain of strychnine three times a day and fifteen drops of iodide of potassium a day.

At first there was a recurrence of dim vision in the right eye, which lasted up until the Friday before Christmas, when Dr. Wilmer pronounced my case hopeless.

The claimant on this date further testified in reference to the history of his blindness, but as said testimony has no particular bearing upon the consideration of the case it will be omitted.

Dr. James A. Freer testified January 25, 1899:

I have known the claimant for about twelve years, and during that time I have been the family physician and that of the soldier. So far as I know, the soldier has always been in good health, with the exception of some temporary ailments. So far as I know, at and prior to enlistment the soldier's eyesight was good; up to enlistment he was working at his profession without any mechanical ocular aid. The soldier first came under my care after his return from Cuba, on, I think, September 9, 1898. I then found him suffering with malarial fever and dysentery. With an inter

mission of about two weeks, commencing September 16, 1898, he has been under my care to the present date. When I was first called to see him he had a very severe attack of dysentery, which lasted about a week. During my absence the soldier had an attack of lobar pneumonia of one lung, attended with the usual symptoms, from which he had partially recovered when I returned and took charge of the case. The whole course of the pneumonia covered about three weeks. During the acuteness of the attack of dysentery and pneumonia the chills and fever were suspended, but before complete convalescence from them the attacks of chills and fever were resumed and have, with some periods of intermission, continued to the present (January 25, 1899). These paroxysms have been of the irregular type and of unusual severity. From the date of soldier's return to Washington I have noticed an unnatural appearance of his eyes, and within a short time he commenced to complain of dimness of vision. I don't remember the exact date. This became progressively worse, amounting to nearly total blindness on or about the 7th or 8th of October, 1898, and to complete loss of vision within a few days following. I referred him to an oculist, Dr. Wilmer, on October 10, 1898.

During my treatment of the soldier it was mentioned one day that he had, by mistake, taken some wood alcohol, but it was mentioned as not of significance and produced none of the symptoms ordinarily resulting from taking wood alcohol.

Question by the examiner:

Was this taking of wood alcohol before or after the commencement of his complaint of dimness of vision?

Answer:

It was after and probably in the early part of October; the exact date I don't remember. In my treatment of the soldier I have never seen any indication of a syphilitic taint; he has a child which is perfectly healthy.

Question:

To what, in your opinion, is the soldier's loss of vision due?

Answer:

From the development of the eye trouble in conjunction with the malarial trouble, and from its aggravation (until complete blindness obtained) during each paroxysm, I concluded that it is the result of malarial poisoning.

Question:

Have you ever had any history of prostration from heat when in the service?

Answer:

I think his father told me that he had so suffered.

Dr. J. H. Branson testified as follows:

I have known Dr. Hendrickson for the past fifteen years. We were boys together. My recollection is that his eyes were all right at such times as I met him prior to his enlistment. If he had any trouble with his eyes prior to his enlistment I knew nothing of it. On September 17, 1898, I was called to see the soldier in the absence of Dr. James Freer. He was then recovering from an attack of dysentery. At that time he was still in bed, but was much better, so much so that I did not see him again until the 24th of September, at which time I was told that he had been up and around; but when I saw him on the 24th there was some trouble with one lung; temperature 105°. I saw him twice that day; the next time his temperature was 103½°. When I saw him on the 25th he was then better. I saw him again on the 27th and 28th. On the 27th, after I saw him, he had a malarial chill. I saw him last professionally on September 30. On the 29th he had another chill, and on the

30th he had two slight chills. I saw nothing more of him, as Dr. Freer returned and took charge of the case on October 1, 1898. During the malarial chill the soldier's temperature was high, but as I did not see him either when the chill was on or immediately after I have no record of what it was. * * * I know there was mention made that his eyes were hurting him, but I took that as one of the symptoms of the fever, and when Dr. Freer told me that he was losing his sight it was quite a surprise to me. I had no reason to suspect anything like venereal trouble in my treatment of the case, but I know he had been a wild boy, but I had no reason to suspect anything of the kind.

I have no information or reason to believe that soldier was addicted to the use of any deleterious drug, unless you call tobacco such. No, sir; I never heard of the soldier having taken wood alcohol. I don't believe I could give an opinion as to the cause of loss of vision; have not given the case sufficient study, as he was not my patient. * * *

Dr. J. H. Wilmer, on January 30, 1899, testified as follows:

I first became acquainted with the soldier October 10, 1898, at which date he was brought to my office by Dr. Wonder, dentist, at which time I received the following history of the case: Having returned from Santiago about four weeks since with history of having had malarial fever, bronchitis, and dysentery, and on October 4, 1898, he was very ill and his sight dim; he took, by mistake for whisky, about from two to five teaspoonfuls of wood alcohol; this alcohol was taken with a great deal of water and sugar, so that it was not noticed. Sight continued to grow gradually dimmer until October 7, when he awoke totally blind, and the note I made of his present condition, October 10, 1898: "Patient very thin, pale, and extremely nervous; pupils widely dilated," and at that time no disease in the interior of the eyes; at that time there was absolutely no sight whatever. Up to October 26 a little sight gradually returned to the right eye, but in the left there was a question whether he even saw the light. From October 26 the sight gradually faded away as it had come.

During this period he had several attacks of chills and fever, which pulled him down very much at each attack. Up to the present date (January 30, 1899) the patient's general physical condition is very much improved, but he is entirely blind, owing to atrophy of the optic nerve, with practically no hope for recovery. The cause of the atrophy, in my opinion, is due to malarial poisoning. In addition, the soldier gave me a history of heat prostration, but in my opinion that has little or nothing to do with the condition of the eyes. I will also state, in my opinion the wood alcohol had nothing to do with the case, but at first I was inclined to the opinion that it had; but when I saw that sight did not return, as in the history of all similar cases of blindness from the use of wood alcohol, I concluded that the loss of sight was due entirely to malarial poisoning, as that is not an uncommon result.

I have also made a careful examination and inquired as to history of syphilis, but found nothing to indicate it. Yes; atrophy of the optic nerve might result from syphilis, such as that with which soldier is suffering, but in my opinion there is nothing of syphilis in this case.

I have been very much interested in the case of Dr. Hendrickson from a scientific standpoint, and since he came under my observation I have read up all the history I could find on the history of poisoning from wood alcohol and have failed to find a history of permanent blindness from such a cause, but do find many cases as due to malarial poisoning from central origin with secondary atrophy of optic nerves.

The attending physician, Dr. Freer, again testified, May 4, 1899, more particularly as to the manner of the development of the blindness. He stated at this time:

From the beginning of my treatment of soldier I noticed an unnatural appearance of his eyes, amounting to a blank, staring gaze, accompanied with evidences of im-

perfect vision; at about this time the soldier complained of dimness of vision and an inability to read ordinary print. My best recollection is that this complaint was first made about the 14th or 15th of September, 1898. The failure of vision progressed, amounting to nearly total blindness on the 6th or 7th of October, and to total blindness a few days later. Sometime between the 1st and 10th of October, 1898, it was mentioned to me that the soldier had accidentally taken some wood alcohol, but it was not mentioned as a matter of significance, nor did I attach any significance to the occurrence, not seeing any symptoms that could be ascribed to it or any alteration in the course of the symptoms that had been manifested from the beginning of my care of the case. I had, in considering the cause of his blindness, never thought of it as in any measure due to the wood alcohol. I could not say for certain whether my attention was called to this taking of wood alcohol on the first or second succeeding day. I don't remember whether vomiting followed taking of this wood alcohol or not; don't know whether I was told about this. * * * I will add, the only thing I noticed in the treatment of this case that increased the loss of sight was the paroxysms of malaria, during each of which vision was materially lessened and finally entirely lost during one, after partial recovery between paroxysms.

Dr. Branson, who attended the soldier during the temporary absence of Dr. Freer, also further testified as to date of the first manifestations of impaired vision.

In reply to the question, "In your attendance in this case did you notice any trouble with the soldier's eyes?" replied:

Nothing more than is usual in case of high temperature. I think soldier's father spoke of his having complained of his eyes hurting him, but I paid little or no attention to that, as he had been having high fever. I was never more astonished in my life than when informed by Dr. Freer over the telephone that soldier was blind. I asked him the cause, and he said he did not know unless it was the use of tobacco. No; I could not fix the date when I received this information.

The claimant was examined on March 9, 1899, by an ocalist, Dr. Burnett, whose certificate is as follows:

The claimant is totally blind. As there is no pupillary reaction with light, there can be no perception of light even. There is atrophy of both optic disks, and from their present appearance it is the result of inflammation of the nerve, and of the acute variety. The other structures of the eye seem not to have been seriously affected. As to the etiology, it is obscure. There are several possibilities; one is the large amount of quinine (from 18 to 27 grains a day) which he took in Cuba while there for four consecutive weeks. Quinine, however, usually produces its effects immediately, whereas in the present case several weeks elapsed between the large doses of quinine and the appearance of the eye symptoms. The neuritis may have been the result of the direct action of the malaria, but such cases are not common and the connection is difficult to establish. As to the wood alcohol, I am not in possession of any positive information on that point. There is an alcoholic amblyopia, but it occurs always in chronic alcoholism and is never the result of acute alcohol poisoning; and, besides, the claimant states and asserts that he can prove that the wood alcohol taken by mistake (on account of increasing defect of sight) was immediately ejected. He admits that he has been a constant drinker all his life—from three to four drinks a day. There are no signs at present of chronic alcohol poisoning.

If I might be allowed to express a personal opinion, I should say that the disability was incurred from causes incident to the service and not through any conscious fault of his own.

On March 11, 1899, Dr. Burnett submitted the following additional report:

Since sending in my report on this case yesterday, I have found in the first number, January, 1899, of the *Zeitschrift f. Augenhulkkunde*, an account by Professor Kuhnt of a case of poisoning by methylic alcohol and its effects on the eyes. The quantity drunk was unknown ("a large swallow," vide report), but on the third day he had great somnolence. Four days after he awoke with great pain in the head and with much dimness of vision, which, a week after the ingestion of the wood alcohol, had gone on to complete blindness. In ten days vision began to return, and in fifteen days more vision was normal. The diagnosis was postocular optic neuritis. A companion who also drank of the wood alcohol was affected with gastroenteritis, but no eye symptoms are reported. * * *

On March 22 Dr. Burnett, apparently in response to a request of the medical referee for additional information, furnished the following statement:

In response to the additional letter of instructions of March 15, I would state that the optic disks are white, of approximately normal size, with not clearly defined outlines, with the retinal vessels diminished in caliber and somewhat in number. This I intended to be understood when I stated in the first report that there was "atrophy of the optic disks and from inflammation of the nerve and of the acute variety" which was intended to be an answer to your question, "Does the appearance of the disks indicate a former neuritis?" * * *

Dr. Burnett, on March 31, added the following to his report:

In accordance with a request from the office as to still more definite information as to the condition of eyes of the claimant and the probable cause of the disability, I would say that, in my opinion, the optic nerve atrophy is not due to a "papillitis," but has followed a retrobulbar affection, and it would seem to me more like the effect of a toxic agent than any other cause. As to malaria, I have learned from Dr. De Beck, of Cincinnati, who is now writing an extensive treatise on the effect of malaria on the eyes, that there is only one case of retrobulbar neuritis reported as caused by malaria, and that history is defective. There are several cases of papillitis following or associated with malaria. The blindness from papillitis is seldom or never sudden, and the evidence of it, of course, manifest for some weeks before it passes into atrophy. The condition of the eye ground and the general history of the case, in my opinion, militate against quinine amblyopia.

The claimant was subsequently examined by two boards of examining surgeons. The instructions for said examinations included all disabilities for which pension was claimed.

The first certificate is dated June 12, 1899, and reports the following objective conditions:

Pulse rate, 96; respiration, 20; temperature, 98.4; height, 5 feet 10 inches; actual weight, 162 pounds; age, 33 years. Tongue coated and indented by teeth; liver enlarged one finger's breadth and slightly tender; no enlargement of spleen; no icterus or anemia; no elevation of temperature. Has malaria. 6/18. No abdominal tenderness or tympanitis; no emaciation or other evidence of dysentery. 0/18.

Chest expansion, 34 to 39 inches; no dullness on percussion; no rales or rhonchi; vesicular murmur good; respiration slightly jerky in lower portion of right lung, indicating a limited adhesion; no friction sound; no coughing during examination. 2/18.

Increase in area of cardiac dullness, apex under sixth rib and in nipple line. A systolic bruit at apex.

Pulse regular, but tumultuous; standing, 120; after slight exercise, 132. No cyanosis, dyspnoea, or oedema. 12/18. Urine examined and found normal. 0/18.

O. D. V. = 0. O. S. V. = 0. Media clear; the optic disk of each side is blanched and diminution in size and number of its blood vessels; pupils dilated and fail to respond to light. Has white atrophy of optic nerves and is totally blind. First grade, \$72.

Has a small tag of a hemorrhoid on verge of anus, size of split pea, not engorged or bleeding. 0/18. * * *

The next examination was made July 10, 1899. The following is a copy of the certificate:

Pulse rate, 100, 110, 124; respiration, 18-20-24; temperature, normal; height, 5 feet 8½ inches; actual weight, 152 pounds, stripped; age, 33 years.

Malarial poisoning: Appearance is not indicative of. No cachexia or anæmia; color, good. Claimant flinches some upon deep percussion over spleen and liver. These organs are not enlarged. No jaundice.

Digestive system: Tongue coated. Some epigastric and intestinal tenderness on pressure. Nutrition good. Muscles firm. No anæmia. Claimant states that his weight in May, 1898, was 176; in September, 1898, 132. Present weight is 152 pounds, stripped. See statement concerning state of bowels. Rectum normal. No piles, fissure, fistula, or prolapsus. Rate, 4/18.

Lungs: Normal upon inspection, palpation, percussion, and auscultation. Breathing, regular. No rate. Claimant is totally blind, either eye; he can not distinguish light from darkness. Pupils are dilated and do not respond to light and shade. Right pupil a trifle shorter than left. Mental condition is good. No paralysis. No atrophy of muscles of body or extremities. No contractures. Probable cause of blindness, optic atrophy. Rate, \$72 per month.

Heart: Apex beat and area of dullness normal. Action regular; is rapid. No murmurs discoverable. Pulse rate, after walking, 124. No dyspnoea, cyanosis, or oedema. No rate.

Catarrh: Cr. naso-pharyngeal catarrh of moderate severity. Rate, 4/18.

No other disability. * * *

As neither the testimony nor the certificates of examination in the case show that the appellant is now suffering from any disability traceable to pneumonia or dysentery, the rejection of these disabilities on the ground stated is hereby affirmed.

It is apparent also that he is not now suffering with malarial fever, nor any of the usual sequelæ of the same.

The total blindness from which the appellant is shown to be suffering has been attributed by your Bureau to the ingestion of wood alcohol, and the claim for pension on account of this disability was rejected on this ground.

The conclusion that poisoning from wood alcohol was the cause of the loss of vision was, apparently, somewhat influenced by the report of such a case from the records of the Navy Department, said report being made a part of the papers in the case, and is as follows:

On July 5, 1898, John Joseph Kavanaugh, C. P., U. S. N., and two others were received on the U. S. ambulance ship *Solace*, transferred from the U. S. S. *Hornet*. They, it was said, had drank of a mixture of wood alcohol and benzine on the night of the 4th. It was afterwards learned from admissions of the patients that this was the origin of their trouble.

The condition of these patients differed widely when received. One was totally unconscious and died in a few hours; another was completely conscious and only suffered from gastroenteritis. Kavanaugh was semi conscious; he could be aroused to consciousness and would answer questions when spoken to loudly. It was noticed at the beginning that his pupils were widely dilated, and they remained so as long as he was in our charge. On the 8th of July, when he had regained consciousness, it was discovered that he was totally blind in both eyes.

After being discharged from the Navy he was examined ophthalmoscopically by Dr. Peter A. Callan, of 35 West Thirty-eighth street, New York, who wrote me that he found both optic nerves atrophied. It was my belief, and is still, that the lesion was central and that atrophy of the optic nerves followed loss of vision, as blindness followed too quickly after the ingestion of the wood alcohol for it to have produced first atrophy and then blindness. * * *

Respectfully submitted.

THOS. H. STREETS,
Surgeon, United States Navy.

In a subsequent communication from the Navy Department the following additional information was furnished.

* * * Record accompanying him (Kavanaugh) from the U. S. S. *Hornet* states: Wood alcohol and benzine poisoning. Stole alcohol and benzine from New York Herald's yacht while lying alongside of *Hornet*, and drank same.

Case paper states: Patient states that after drinking some wood alcohol and benzine he became totally blind with very diminished sensation in both eyes but no loss of motion. Given strychnine gr. 1/30 one t. i. d. Has vague pains in abdomen and chest. Pupils dilated widely. July 23, no change, continue treatment. August 2, sensation returning and less pain in legs. Vision slightly improved. August 3, no change, continue treatment. August 12, no change, strychnine gr. 1/30 t. i. d. and K. I. (iodide of potash).

Ophthalmoscopic examination made. Patient had white atrophy of both optic nerves. * * * October 11, discharged from the service on medical survey. * * *

As regards the case of the man who was transferred to the *Solace* at the same time as Kavanaugh, the records of the *Solace* show that he was discharged to duty July 7, the second day following his admission to the sick list of the *Solace*. * * *

The question to be determined in this case is, whether or not this appellant's disability, blindness, is due to his military service.

If said blindness is due to malarial poisoning he is clearly entitled to be pensioned therefor, but if due to the ingestion of wood alcohol, whether accidentally or intentionally, he is not so entitled.

It is shown that the pathological condition causing the blindness is atrophy of the optic nerve. It is further shown by the early history of the case that said atrophy commenced posterior to the eyeball, a retro-bulbar neuritis. This was the diagnosis of the official oculist, Dr. Burnett, and is substantiated by the findings of Dr. Wilmer when he made his examination on the 10th of October, when he found "no disease in the interior of the eye," although blindness became marked on October 5.

It is evident that the oculists were undecided as to the cause of the disease of the optic nerve. This uncertainty seems to have been largely due to a lack of knowledge as to the action of a poisonous quantity of wood alcohol.

The dose of wood alcohol, as given in Merck's 1896 Index, is 10 to

40 minims. The soldier drank from 60 to 300 minims. "Two to five teaspoonfuls."

Dr. Wilmer testified that—

"The cause of the atrophy, in my opinion, is due to the malarial poisoning. . . . I will also state, in my opinion, the wood alcohol had nothing to do with the case, but at first I was inclined to the opinion that it had, but when I saw that sight did not return, as is the history of all similar cases of blindness from the use of wood alcohol, I concluded that the loss of sight was due entirely to malarial poisoning, as that is not an uncommon result.

He further stated that he was much interested in the case—

"From a scientific standpoint, and since he came under my observation, I have read up all the history I could find on the history of poisoning from wood alcohol and have failed to find a history of permanent blindness from such a cause, but do find many cases as due to malarial poisoning from central origin with secondary atrophy of optic nerves."

It appears then that this physician's opinion was based solely upon the fact that he had not been able by reading to find a case with a similar history, i. e., a case of permanent blindness following ingestion of a poisonous quantity of wood alcohol.

It further appears that your bureau did find a case with such a history.

Although Dr. Burnett expressed the opinion that the soldier's blindness "was incurred from causes incident to the service," it was made without a full knowledge of the history of the case.

Since the adjudication of this claim appears to have been, as before stated, determined by the amount of literature bearing upon wood-alcohol poisoning, I have caused to be made a careful search of all literature in the library of the Surgeon-General's Office, bearing upon both poisons, malarial, and wood alcohol, as to their effects on the eye.

There is a paucity of literature on wood-alcohol poisoning. This is attributed to the fact that this substance has not been in general use but for a comparatively short time.

The following is an extract from a case reported in the Medical Record for May, 1898:

A young man convalescing from measles drank, on July 1, 1897, 60 cubic centimeters (about 2 fluid ounces) of Columbia spirits (wood alcohol), mixed with water and sugar, at 5 p. m. Two hours later, having experienced pleasurable effects, he again diluted 60 cubic centimeters of the spirits with water and sugar. He slept ten hours following this dose. After this time he had violent emesis and gastric pain. Twenty-four hours after having taken the spirits he complained of loss of sight, and on examination of the eyes there was found total dilation of both pupils. No reaction to light or accommodation—right vision, none; left vision, none. Ophthalmoscopic examination revealed double optic neuritis with congested retina. For seven days loss of sight remained complete. Three weeks after the poisoning the patient was able to see moving objects and count fingers at 6 inches.

On September 20, about two and a half months after taking the poison, there was no reaction of the pupils to light. With right eye counts fingers at 6 inches; with the left eye there was perception of light only. This man was practically blind.

This case, with the other case referred to in this paper, seems to clearly show that permanent blindness is caused by the ingestion of wood alcohol. Just what quantity of the spirits is necessary to produce this effect can not be determined from the cases reported.

In the case of the companion of Kavanaugh, there were no eye symptoms observed; neither were there any in the second case reported by Kuhnt, quoted by Dr. Burnett, in his certificate of examination of this claimant.

In the two fatal cases of wood-alcohol poisoning reported by the surgeon in charge of Division Hospital, Camp Alger, Virginia, to the Surgeon-General United States Army, July, 1898, the symptoms observed were—

Gastric pains of acute character, almost persistent vomiting, dryness of the mouth and throat, and thirst. The speech quite coherent, but eyes with dilated pupils, incapable of recognizing either persons or things only a few feet distant.

Dr. Viger, in *l'Année Médicale*, 1877, reports the case of a man who had drunk the supernatant liquid after precipitation of gums in varnish. This liquid contained wood alcohol. One hour after drinking an unknown quantity there followed headache, vomiting, profuse sweating, dilatation of the pupils, and delirium. The next day delirium was gone, but he was completely blind. After a week sight slowly returned, until at the end of six weeks he could see his way about with the left eye; with the right he could barely distinguish light. Two years later he was entirely blind.

Dr. Gifford, in the *Ophthalmic Record*, September, 1899, reports the case of a man who drank about one-half pint of a mixture containing two-thirds water and one-third wood alcohol. This was drunk on December 5, 1898. At 9 p. m. on the 7th he began to vomit; headache followed and the next morning everything looked foggy. The sight slowly got worse, and when he awoke on the morning of the 9th he could not see light. His pupils were wide and did not respond to light. December 21, no light perception, pupils wide and irresponsive to light. In about ten days vision began to gradually return and in ten days more he could count fingers at several feet. After remaining stationary for about a week the vision gradually failed until, when last seen, January 21, 1899, it was reduced to hand movement at $1\frac{1}{2}$ feet in the right eye and 4 or 5 feet in the left eye.

Since then the doctor had heard that this patient is entirely blind.

Another man drank the alcohol on Thursday night and died Saturday morning, after having become entirely blind.

Two brothers purchased about 1 pint of Columbia spirits or purified wood alcohol. One drank freely, the other about 3 ounces. The man

who drank the most died in twenty-four hours and did not complain of any eye trouble. The other died about the same time, totally blind.

Dr. Moulton, in *Ophthalmic Record* for July, 1899, reports the case of a man, age 33 years, who, with about thirty others, drank, on October 8, 1897, wood alcohol, some of them drinking but little, but five of them, including his patient, took more, perhaps something like a half-pint each. All were very sick. Two men died within twenty-four hours. Two others recovered perfectly. The fifth, the patient, became very weak and his heart's action very feeble, but he was never unconscious. The next day after drinking his sight began to grow dim, and in a few hours was lost entirely. In a few days some sight returned, since when the condition has remained unchanged. Vision in right eye, perception of light; vision in left eye, fingers at 1 foot.

The following is the only reported case found of complete loss of sight of both eyes as a complication of malarial poisoning.

This case was reported by A. C. Basu, in the *Indian Lancet*, Calcutta, 1896:

Hindu male, age 24, had a severe attack of fever on the 11th of February, 1896, with cerebral symptoms. Saw him on the 13th of February, when his condition was as follows: Perfectly unconscious, eyes congested, violently delirious at times. Tongue dry and covered by a black coat; pulse 120; temperature, 103-4 F. On February 19 he regained consciousness, but could not see with his left eye. On February 21, there was loss of sight of right eye too. Both eyes painful, red, and watery. On February 23, condition as follows: Fever of a remittent type with evening exacerbations, temperature running up to 104°. Severe darting pains over head and temples. Left eye red, watering; slight effusion of lymph in the anterior chamber. Pupils inactive to the light. Under the ophthalmoscope no fundus reflex. Tension, + 1. V = O. Right eye: Pupil inactive to light, very red, and watering. Tension, + 1. V = O. No fundus reflex by ophthalmoscope. There was marked paresis of both legs. Extreme pain over the lumbo-dorsal region of the spine. Sensation intact. Patella reflex exaggerated. Insomnia marked. Other organs normal. No history of syphilis. February 25, 1896, pupil slightly dilated. No improvement in any other symptoms. February 28, a peculiar grayish reflex was observed in both fundus oculi. * * * March 10, paresis in both legs increased. He could now perceive light in right eye. * * * Suffered with fever, off and on, until April 13, when fever left him. He could not walk at all. Present condition, October, 1896, much improved. Can walk 3 or 4 miles a day. Can see well with right eye with the help of + 10, D. Left eye, preception of light. Tension, 1. No fundal reflex.

Remarks.—I have seen 11 such cases, with history of fever—sudden blindness of both eyes and gradual paralysis, and all died by gradual asthenia. In all these cases there was marked optic neuritis, only one of these was treated in the eye hospital, but no post-mortem could be had. In the absence of post-mortem the exact morbid conditions could not be ascertained. That there was marked meningeal mischief is evident. This might have produced retino-choroiditis with subretinal effusion.

Dr. G. E. de Schweinitz, in *Medical News*, June 7, 1890, says:

* * * Disturbances of vision during the course of intermittent fever have been observed from the earliest days, many of the recorded cases having been reported in the preophthalmoscopic period. Leber divides the amaurosis of malaria into two varieties, typical or intermittent and stationary amaurosis. In temporary amaurosis the fever is usually of the tertian type, and may be associated with severe nervous

symptoms, delirium, coma, aphasia, or loss of vision begins with the chill, lasts through the fever and subsides with the sweat, as was shown years ago by Kuhlbrand and Tott.

The result of numerous observations is that amblyopia not infrequently complicates malaria and appears in the form of a transient loss of vision or a complete blindness. Its duration varies from a few moments to several hours, days, or even months, and it disappears under antiperiodic treatment, as Tullais said, with the same quickness with which it came about, leaving not a single trace of its passage at the bottom of the eye. In most of the amblyopias just referred to, the ophthalmoscopic findings were negative, or the descriptions are included in the vague terms applied to the retina or optic nerves, "congestion, hyperemia, redder than normal."

Ten text-books on diseases of the eye were consulted as to the causes of retro-bulbar neuritis, and none named malaria as a cause.

One authority (Pick) gives the causes of this pathological condition as "acute infectious diseases, syphilis, and lead poisoning, but all together are not so disastrous agents as the abuse of tobacco and alcohol.

The disease is therefore often called tobacco or alcohol amblyopia or "intoxication amblyopia."

To arrive at a just conclusion in this case it seems necessary to contrast it with other cases where the ingestion of wood alcohol has produced blindness, and I am forced to conclude that there is a remarkable resemblance to those cases; in fact, the effects of the poison on the optic nerve appears to be so uniform that it seems that its action on said nerve is specific.

In contrasting it with those cases due to malarial poisoning it has few, if any, features in common.

It appears that in cases where total loss of vision developed during such an illness the subjects were profoundly affected by the fever, manifesting symptoms of brain involvement, including paralysis, most of such cases proving fatal.

In those cases where the vision was impaired, not entirely lost, restoration was effected by the administration of anti malarial remedies.

I fully agree with the attorney in this case that "If there is human affliction which appeals most strongly to human sympathy it is total blindness," but, as above stated, I am forced to the conclusion that the blindness with which this appellant is suffering was not appurtenant to his military duty, but was the direct result of the ingestion of a poisonous quantity of wood alcohol.

The action appealed from is therefore affirmed, and the papers are herewith returned.

MARRIAGE—CONSANGUINITY—INFANTS.

ABBIE SALMON (ALLEGED WIDOW).

A marriage between an uncle and his niece is valid in the State of New York. The marriage in the State of New York of a female under 13 years of age is valid, though voidable; but can not be avoided if she cohabits with her husband after she becomes of the age of legal consent.

First Assistant Secretary Thomas Ryan to the Commissioner of Pensions, January 10, 1900.

This appellant, Abbie Salmon, on October 9, 1897, filed a claim, No. 628988, for pension under the Revised Statutes, as the widow of James H. Salmon, who was a member during the war of the rebellion of Company I, First Michigan Infantry, and died January 29, 1896.

Said claim was rejected in April, 1898, on the ground that claimant is unable to show the death or divorce of her first husband prior to her marriage to this soldier, and that the latter marriage was therefore void; and she appealed May 10, 1898, contending that her first marriage was invalid, first, because she was then under 13 years of age, and, second, because her first husband was her own uncle.

Neither of these contentions is sound. While claimant's marriage in 1855 or 1856 to Peter Burget, her uncle, may have been voidable on account of her nonage (the laws of 1841 of the State of New York providing for annulment of marriages where the female was under 14 years of age), yet at common law females under 12 years of age might contract a valid marriage, even without consent of parents (*Bennett v. Smith*, 21 Barb. Ch., 439, citing numerous authorities), and these rules of the common law were held, in the case cited, to be still (in 1856) in force in the State of New York, with the exception that the voidable age was raised by the statutes cited to 14 years.

Furthermore, until annulled a voidable marriage is valid, and there is no pretense of any annulment in this case at any time. And, yet further, under the statutes of New York State this claimant has no right to an annulment upon the facts in her case, as she admits cohabitation with said Burget for seven or eight years after her marriage to him, and section 1744 of the Code of Civil Procedure provides that—

A marriage shall not be annulled * * * where it appears that the parties for any time after they attained that age (of legal consent) freely cohabited as husband and wife.

See *Sally R. Fuller* (10 P. D., 238).

As to the second assignment of error, it need only be stated that the laws of New York do not in terms inhibit marriage between uncle and niece, and there is nothing in the common law inhibiting such a marriage. This appellant's marriage to her uncle, Peter Burget, therefore, was clearly a valid and legal marriage, and it is not contended that he either died or was divorced from her, or she from him, prior to her

marriage to this soldier in 1868. It is stated that he deserted her after they had lived together for seven or eight years, and his subsequent whereabouts is not shown. She remarried five years after such desertion, with the understanding, she says, that her marriage to her uncle was invalid, and that no divorce therefrom was necessary in order that she might remarry.

As seen, however, such first marriage was valid, and, it being so, her subsequent marriage was invalid or void.

Your action herein is affirmed accordingly.

PRACTICE—ATTORNEYS—SPECIAL EXAMINATIONS.

ASCHA HUGHES (MOTHER).

The relations between attorney and client, in a pension claim, are not such as to give the attorney all of the same rights that he would have under the common law. The mission of, and the procedure under, a special examination is such as to preclude the absolute necessity of the presence of an attorney to protect either his own or his claimant's rights. The prevailing practice of allowing an attorney to be present, and to take part in a special examination, if so requested by claimant, is all that is necessary under the circumstances, for the Government is not in any wise a defendant in such proceedings.

*First Assistant Secretary Thomas Ryan to the Commissioner of Pensions,
January 10, 1900.*

Ascha, mother of Hiram Hughes, formerly a private in Company E, Twenty-first New Jersey Volunteer Infantry, filed her application as dependent mother under the general law on July 9, 1889, claim being rejected on May 9, 1898, on the ground that dependence at date of soldier's death was not shown. An appeal filed by attorney on June 2, 1898, is in the following language:

I claim this rejection is illegal. I am the attorney in this case. I was not notified to be present when the detective was at work and was given no opportunity to look after her interests and my own. Have I not the right to be there?

It is seen that the real contention is that the special examination was illegal, or, in other words, unlawful, and that the rejection being based upon the alleged unlawful procedure was, therefore, unlawful.

The rights of an attorney in a pension claim, either so far as his claimant's or his own interests are concerned, are wholly a matter of statute or practice. The general relations existing between attorney and claimant, while prevailing to some extent in pension claims, have not such a full and comprehensive scope as at common law. While in an action at law or equity attorneys are generally a necessity, and very often absolutely so, yet the same can not be said as to pension claims; and this for the reason that the Government does not occupy the legal status of a defendant at law. There is no law authorizing an attorney to be notified of the pendency of a special examination, neither is there

any necessitating the presence of an attorney at such a time. The whole matter then becomes a matter of practice, and is dependent upon such rules as may be laid down by the Commissioner of Pensions concerning the matter, such rules being subject to the approval of the Secretary of the Interior. (Sec. 471, Revised Statutes.)

I find no written rule upon the question at issue, but I do find a very well-defined practice prevalent in such matters which has grown to be an unwritten rule of procedure. The practice now and for a long time in vogue appears to be that the claimant shall be duly notified in writing of the intent of the Commissioner of Pensions to hold a special examination, and that such notification, containing a statement that claimant, either in person or by attorney, has the privilege of being present and of taking part in the said examination, be served upon the claimant. That after said examination has taken place the claimant shall be advised as to the testimony adduced, and that the said claimant be given the opportunity of objecting to any of the proceedings, especially so far as conduct, manner, or fairness is concerned. The claimant is also given the opportunity to state whether or not, in the event that further examination is necessary, he or she desires to be present either personally or by attorney.

I am convinced, upon mature deliberation, that the relation between an attorney and claimant in a pension claim is not of such a confidential and delicate a nature that it is absolutely necessary an attorney should be present during a special examination for the protection of his own or his client's interests. This I think apparent when we take into consideration that a special examiner is not in any sense an attorney for defense on the part of the Government, but is simply an authorized agent of the Government whose business it is to impartially gather all facts and reduce them to writing, whether such facts be for or against the claimant or the Government. Experience has shown that the method of procedure results in great gain to claimants, and so far as actual results are concerned experience also shows that the cases are exceedingly rare where a special examiner ever reports facts in a manner to bias the testimony in favor of the Government. When such does actually occur, rare as it is, it is apparent upon the face of the papers.

It is clear, by the use of the word "detective" (not a happy one by any means) by the attorney in his appeal, that he considers the mission of a special examination to be to defeat a claim; and this feeling seems to be shared by many, as is often apparent in appeals. The truth, it may be remarked, is directly the opposite. One great and governing reason for special examinations is that a claimant may be given the opportunity to prove his claim, and not that the Government may defeat it. This truth is clearly apparent from the fact that every claim which is subjected to a special examination would, without such an examination, stand rejected for lack of evidence to admit it. The spe-

cial examination is given that claimant may overcome the grounds of rejection, and the vast number of claims admitted wholly by reason of the testimony adduced at special examinations show the absolute fairness of the Government in the conduct of such examinations.

It is often apparent, in appeal papers, that the impression prevails among many attorneys, as well as claimants, that the prime object of the Government in pension matters is to defeat a claim if possible, special examinations being used for that purpose. This impression, it may be unhesitatingly stated, is absolutely without foundation, is not true in any particular, and those who prosecute claims upon such a theory stand in their own light. Every possible opportunity is given to a claimant and his attorney to establish a claim, the only object of the Government in these matters being to use all possible means to arrive at the actual truth. The end aimed at by the Government is never to defeat a claim or to presuppose that it is not a legal one, but is, rather, to allow the claim if the law and the facts in evidence will admit of such allowance.

By reason of the foregoing it may be stated that attorneys have no inherent right by virtue of their relation to their client to be notified of or to be present at a special examination, and that no good reason is apparent why a special rule should be made with a view of bringing about such a result. While it is true that occasions often transpire where the attorney is notified of the intent to hold an examination, yet said notice is given by courtesy; it also often happens that attorneys are frequently invited to be present and take part in the examination, but this is also by courtesy which, it may be remarked, is invariably extended if so requested by the claimant.

The files show that the claimant in the within case was duly notified of her rights on April 13, 1898; that she requested the special examination to take place at once; that she did not desire to be present during said examination either personally or by attorney; that the examination took place on April 13 and 14, 1898, all of the testimony being read over to her after the same had been reduced to writing; that she expressed herself unqualifiedly satisfied with the conduct of the examination, had no complaints to make, and that if further examination was necessary she did not desire to be present either by herself or attorney. As a matter of fact no further examination was held.

The point raised by the attorney is not well taken, does not go to the merits of the case, and the rejection of the claim is therefore sustained.

The action appealed from is affirmed.

MARRIAGE- LOUISIANA AND MISSISSIPPI EVIDENCE.

LOUISA C. GERMAIN (WIDOW).

The evidence shows that at the time of claimant's marriage to the sailor he had a lawful wife living and undivorced, so that the marriage was void ab initio. This is not only the general rule of law, but is in accord with the decisions of the courts, especially in Louisiana and Mississippi, where these parties lived. And there is no evidence to show that a new contract of marriage or other form of consent was entered into after the removal of the impediment; that is, the death of the first wife, which was five months before sailor's death. Marriage can not be presumed, and rejection of claim was proper.

*First Assistant Secretary Thomas Ryan to the Commissioner of Pensions,
January 20, 1900.*

Louisa C. Germain has filed two claims for pension as the widow of Charles Germain, late acting master, United States Navy. The first, under the general law, was filed December 23, 1897, and the other, under the act of June 27, 1890, was filed January 22, 1898. These claims were rejected September 19, 1899, on the ground that the claimant is not the legal widow of the sailor, it being shown that at the time of his marriage to her he had a wife living from whom he was not divorced. Appeal from this rejection was entered October 19, 1899, in which the chief contention is that said action was based on a legal opinion which stated only a general proposition as to the validity of the marriage of claimant to sailor, and did not consider the State statutes. It is also urged that the evidence on file is sufficient to show that whatever impediment to said marriage at first existed, a valid marriage was consummated upon the removal of such impediment.

There is considerable evidence in the case from which the important points bearing upon the issue are gathered, as follows: The sailor, Charles Germain, was appointed acting master in the United States Navy, May 17, 1861; was discharged June 4, 1861, and was reappointed August 23, 1861, resigning June 23, 1863. He was subsequently pensioned at total of rank, \$20 per month, for disabilities incurred in the service, and died November 30, 1897. He did not meet the claimant, according to her own statement, until about six months before their marriage, in June, 1871. She has been unable to furnish any proof of this marriage, but states the circumstances under which it took place, admitting, however, that it was very quietly celebrated for some reason known only to the sailor. She was living temporarily at Mobile, Ala., where she first met sailor, but she went to New Orleans, La., for the purpose of being married to him, and they were married at the house of a minister with no witnesses but the minister's daughter. She does not know whether sailor procured a license or not. There is no record showing that he did, nor other evidence to substantiate her statement of the marriage other than the testimony of several witnesses

who know that she and sailor began to live together about that time, 1871, and were reported to be married.

There is record proof showing the marriage of sailor and claimant December 24, 1888, at New Orleans, La., and the latter explains this by stating that sailor told her he had lost the certificate of their first marriage, and having failed to have it recorded he thought it best they should be married over again in order that she might have no trouble in making proof and procuring a pension as his widow after his death. She states they were living at Meridian, Miss., at that time, but went quietly to New Orleans and had another secret marriage, as they did not wish to create conjecture and gossip among their friends and neighbors. It is well shown that they lived together uninterruptedly from 1871 to sailor's death, as husband and wife; were so known and recognized, and so represented themselves. Upon this evidence, and in ordinary circumstances, their marriage could be presumed, even if no ceremony was performed in 1871, and if the marriage of 1888 had not occurred. But the evidence further shows that sailor had been previously married once, if not twice, and his first wife was still living and undivorced in 1871 and 1888, and up to within five months of his death, she having died in June, 1897.

On this subject the evidence is clear that the sailor was married to said first wife, Martha Pinkney, in 1841, at Long Island, New York. By her he had six children, and five of these are still living. Some years before the war, the exact date not shown, he had a disagreement with his wife and they separated. He went away, it is stated, to Pennsylvania, from which State he was appointed in the Navy. It is also evidence that while in that State, but just when is not shown, he was married to, or began to live with one widow Bryant, whose maiden name was Annie Holton, and whose brother, Thomas Holton, afterwards lived at Algiers, La., where claimant and sailor made their home for a time after 1871. It is not proved that sailor was married to this woman, Annie Bryant, although it is shown that her brother and sister-in-law, as well as others, believed they were married. The claimant states that the sailor told her that he had only been married once before his marriage to her. The said Annie lived with him in New Orleans and died there in August, 1866. No divorce between the sailor and his first wife, Martha, has been shown and there is nothing to indicate that there may have been a divorce. From the testimony of her children and other relatives it is rather certain that she did not procure a divorce, while the fact that sailor never mentioned having obtained one and his secrecy about marrying the claimant would seem to indicate that he made no effort in that direction. The claimant has declared that she never knew of this first wife until after the sailor's death, that he had told her of being previously married but he had stated his former wife was dead and she supposed he referred to the one who died

in 1866, in New Orleans. She has furnished some letters, however, written to her by sailor's son and other relatives, which indicate that she knew more of the first wife and the separation from her than she is willing to acknowledge. These letters, some of them written years ago, refer to the sailor's separation from his first wife, to his long absence, unheard of by the writers, and to his marriage to the claimant, and contain expressions of gratefulness that he had found content and happiness in such marriage. But none of them intimated that the separation from the first wife was a legal one, and the testimony secured by special examination shows positively that there had been no divorce.

Thus it may be readily seen that at the time or times when the sailor was married to claimant he had a lawful wife living, and that the general proposition of law, given in the opinion upon which the rejection was based and of which the complaint is made, was eminently correct and appropriate. That proposition is contained in the following paragraphs, quoted from Stewart on Marriage and Divorce:

A marriage per se and without any decree, invalid for all intents and purposes, no matter in what proceeding or in what court the question arises, is called a void marriage. Thus, if a man being already married marries another woman his marriage is invalid to all intents and purposes without any decree, whether in a proceeding between the parties to settle the question or in a proceeding after his death, in which his issue claim as legitimate. * * * (Sec. 50.)

A man can not have at the same time two wives or a woman two husbands, and one who has married once can not marry again unless such first marriage was void or voidable, and has been duly avoided; or, if valid, has been dissolved by absolute divorce or death. And if an apparent second marriage is had it is not voidable only, even where a statute provides that it may be decreed null; but no decree is necessary, and it is void ab initio. * * * (Sec. 76.)

A second marriage, the first subsisting, is void, not voidable; a decree may be obtained declaring it void, but this is unnecessary. * * * (Sec. 79.)

But it is not alone the general rule which sustains the holding that claimant's marriage to the sailor was void from the beginning. The State courts have uniformly embodied the like rule in their decisions. And, especially in Louisiana, where these marriages are alleged to have occurred, and in Mississippi, where the parties lived for a number of years and up to sailor's death, have the courts emphasized the invalidity of such a marriage. In the former State, in the case of *Summerlin v. Livingston* (15 La. An., 519), the court used this language:

Persons legally married are, until a dissolution of marriage, incapable of contracting another, under the penalties established by the laws of this State. (C. C., 94.) The nullity of such a contract is absolute, as it contravenes the policy of the law, and, *bes des*, subjects the guilty party to a criminal prosecution. Such nullities are not even susceptible of confirmation or ratification, whether express or implied. (C. C., 115, 2252.) Nor is it necessary that a direct action be instituted for the purpose of setting aside the contract; its nullity may be demanded by way of exception or defense.

And so, in the case of *John Carmena v. Mary Blaney* (16 La. An., 245), a suit as to the validity of a legacy made by Joseph Carmena, a brother of the plaintiff, to the defendant, as his wife, it was stated:

The deceased and the legatee were never lawfully married, but lived as man and wife up to the death of the former.

On the 29th of November, 1856, she obtained against her husband, Thomas Simpson, a judgment of separation from bed and board; and four months having elapsed, she and Carmena, being unable to marry in the State of Louisiana, went over to the State of Mississippi, where they were married. Both parties were residents of the former State, and returned to their home immediately after the marriage ceremonies were performed.

The marriage of Simpson with the legatee up to the present time has not been dissolved by a decree of divorce, and at the date of these proceedings in the lower court he was living in an adjoining parish.

As a matter of law our courts can not treat her otherwise than as a concubine, even admitting, as her counsel strenuously contend, that, as a matter of fact, she did believe herself finally divorced. She could not plead ignorance of the law and of the nature of the proceedings in which she was party plaintiff. Nor can we be influenced in this matter by the fact that she was esteemed in the neighborhood and exchanged social intercourse with respectable families.

In that case the situation of the parties as to residence was just the reverse of the sailor and claimant in 1888, when they left their home in Mississippi and went to Louisiana to be married, returning to the former State, and it is not material that sailor's former wife was living in the State of New York instead of in an adjoining county.

A decision of like import shows the rule in Mississippi. It is in the case of *Smart v. Whaley* (6 Smed. & M., Miss., ch. 308), and the head note alone is sufficient to demonstrate the full indorsement of the general rule by that court. It is as follows:

J. W. filed her petition for dower in the lands of her alleged husband, G. W.; J. S., the grantee of her husband, contested her right of dower on the ground that she was not the wife of G. W. On the trial of the petition it was proved that J. W. was married to G. W. in 1814, and that in 1815 M. F., who had been married in 1809 to G. W., was alive. G. W. and J. W. after their intermarriage lived together as man and wife for twenty-five years, until the death of G. W.: *Held*, that the wife of G. W. being alive when he married J. W. the latter marriage was absolutely null, and J. W. not his wife, and therefore not entitled to dower in his lands.

This matter has been discussed at length and in all its phases in the decision of the appeal of *Ann Eliza Server* (7 P. D., 468), to which reference is made. Thus, it is clear that not only were the marriages relied upon by claimant as basis of her title absolutely void, but there was no time when such marriages could be regarded as valid. As shown, the former wife lived, undivorced from the sailor, up to within five months of his death, so that this short period is the only time during which claimant might have been married to him. But there is no evidence that a ceremony or other form of contract was entered into within such period, and nothing else is shown to have occurred from which it may be inferred that after the impediment was removed, a renewal of consent was had between the parties.

Such consent is essential to be proved before a marriage under the circumstances could be presumed, as is contended for in the appeal. The cohabitation of the sailor and claimant was unlawful in the beginning, however they may have regarded each other or have been regarded by their neighbors. Cohabitation and reputation alone are not marriage, nor is a ceremony in pursuance of a license, when a legal obstacle exists. So, when this obstacle is removed a change of relation, affirmatively proved, indicating consent of both parties, is altogether necessary. In this case no such consent is shown, and there is no ground for presuming it, because claimant declares she knew nothing of the existence of the impediment while sailor was living, nor of the removal of the same. This is a virtual admission that no new relation was entered into, but the illicit relation continued to the end.

It is unnecessary to go further into this question. Claimant never was the lawful wife of the sailor, and is not, therefore, his widow nor entitled to pension as such. The rejection of the claims is accordingly affirmed.

RATES AND RATING, ACT JUNE 27, 1890—PRACTICE.

ISAAC B. CHILDERS.

Appellant filed his first claim for pension under the act of June 27, 1890, on September 24, 1891. Said claim was rejected October 30, 1894, on the ground of no disability shown under the act. Certificate of medical examination made under the claim showed existence of an inguinal hernia, incomplete. A second claim was filed June 23, 1897, under said act, together with a claim under the provisions of the act of March 6, 1896. Pension was allowed for an inguinal hernia from date of filing last declaration, and former rejection was adhered to by the Bureau on the ground that a schedule of rates prepared for general law pensioners fixed a rate of only \$4 per month for a like condition during a period prior to December 4, 1891.

Held, That in fixing rates of pension in claims under the act of June 27, 1890, only the degree of inability for earning a support by manual labor should be considered, other laws and schedules not being allowed to influence the action.

First Assistant Secretary Thomas Ryan to the Commissioner of Pensions, January 21, 1900.

Isaac B. Childers, late a private in Company B, One hundred and tenth Ohio Volunteer Infantry, is a pensioner under the provisions of the act of June 27, 1890, on account of partial inability to earn a support by manual labor. Certificate numbered 957,160. The pension was made to begin on June 23, 1897, date of filing a second declaration under said act, a previous claim having been filed on September 24, 1891, and rejected October 30, 1894, on the ground of no ratable disability shown.

By medical action December 10, 1898, the rate above named was

allowed, and at the same time a claim for reissue to change date of filing the first declaration, under the provisions of the act of March 6, 1896, was rejected.

This appeal, entered on April 11, 1898, is from this adverse action. The appellant contends that he was disabled for manual labor in a pensionable degree at the date of filing the original declaration and by the disabilities named therein.

The disabilities named in the first declaration were right inguinal hernia, weak back, and pain in head.

The medical referee, in an advisory opinion dated September 19, 1899, stated that a rate from date of filing the original declaration, September 24, 1891, can not be allowed, but a rate can be allowed for an inguinal hernia from June 6, 1892, the date of an affidavit filed by the appellant, if the board of review can accept said date or any other date prior to June 23, 1897, as the date of commencement of pension.

As the hernia named in the said opinion as ratable from June 6, 1892, also existed on December 16, 1891, date of certificate of medical examination made under the original declaration, and as the medical referee did not give reasons why a rate can not be allowed from the date of filing said first declaration, the papers were returned by the Department on December 9, 1899, for a further report and the reasons for his holding. Your attention was also invited to the fact that incomplete inguinal hernia is included in the Bureau schedule of disabilities for which pension is granted under the act of June 27, 1890.

In response to this request the medical referee, under date of December 16, 1899, furnished the following report:

Under date of the 9th instant the honorable First Assistant Secretary returned this case for a further report, showing the reasons why I had stated that the rating for hernia can not be made to begin from the date of filing the first declaration under the act of June 27, 1890. He refers to my advisory opinion of September 19, 1899, containing that statement.

The report of the first medical examination, December 16, 1891, showed a direct right inguinal hernia, $1\frac{1}{2}$ inches in diameter, which did not pass through the external abdominal ring; this is the description of an incomplete hernia. The report of the test examination, June 6, 1894, stated that no hernial tumor appeared in the inguinal canal, but described an enlarged inguinal gland, three-fourths of an inch in diameter, resting in the right inguinal region and resembling a hernia, and also an enlargement of the left testicle. The last examination, December 15, 1897, on which the present allowance was based, showed a hernial tumor on the right side, 2 inches in diameter, passing entirely through the external abdominal ring; this describes a complete hernia. It is evident, therefore, that the condition was quite different in 1891 and in 1897; the tumor described in 1891 was incomplete, while that shown in 1897 was complete.

Under order 164, and until it was abrogated by the departmental decision of May 27, 1893, in the Bennett case, ratings under the act of June 27, 1890, were the same, up to the maximum, as were allowed for similar disabilities under the general law. Under ruling 245, dated December 4, 1891, the schedule rates for certain disabilities were increased from that date. The rating for an incomplete inguinal hernia was increased from \$4 to \$6 per month, and for a complete hernia from \$8 to \$10 per month. Accordingly, after that time an incomplete hernia was rated at \$6 from the

date of filing a subsequent claim under the act of June 27, 1890, although previously a rating had not been allowed for that condition alone under said act.

Subsequent to the abrogation of order 164 it became the usual practice (although no former schedule was promulgated) to allow \$6 under the act of June 27, 1890, for complete inguinal hernia, but incomplete hernia was not thereafter rated alone under said act prior to May 3, 1897, when the schedule referred to in the departmental communication was adopted. Since that date incomplete as well as complete hernia has been rated at \$6 under said act; and this has been the uniform action in all cases, whether original, reissue, or appealed. But in no instance whatever, within my knowledge, has a higher rating been allowed under the act of June 27, 1890, than was allowable under the general law for the same disability or condition covering the same period. As there has been no warrant for allowing more than \$4 per month prior to December 4, 1891, for incomplete hernia under the general law, I have uniformly held that an allowance for that condition alone could not be made under the act of June 27, 1890, from the date of filing any claim prior to December 4, 1891. Hence, in this case I stated that the rate could not be allowed from June 6, 1892, or any other date prior to June 23, 1897, which could be legally accepted.

While "disability" due to service in line of duty and a material "degree of inability to earn a support" by manual labor, with other conditions, confer pensionable status under the general law and the act of June 27, 1890, respectively, special ratings have from time to time been adopted for certain conditions and disabilities, among which are the different varieties of hernia, and such ratings have been reduced or increased according to the views of different executive officers. It was clearly not intended, by the adoption of the schedule of ratings of May 3, 1897, to make the rating of \$6 for incomplete hernia in any case antedate December 4, 1891, while the rating for that condition under the general law prior to that date was only \$4. To allow a rating of \$6 for any cause under the act of June 27, 1890, for a period during which the recognized rating for the same condition under the general law was only \$4, would exceed the liberality of order 164, which only required that the same disabilities should receive the same rates, a requirement which led to its abrogation.

It may be argued that "the degree of inability to earn a support" from incomplete hernia was as great in 1891 (or in 1861, for that matter) as in 1897; and it is now admitted that the basis of rating is essentially different under the general law and the act of June 27, 1890. But it is clearly evident that the rule and practice prior to December 4, 1891, in regard to that condition, was sharply defined; that the ratings which were fixed before and after that date for that affection were considered appropriate; and that said ratings were applicable over the respective periods under both the general law and the act of June 27, 1890, until order 164 was abrogated. I do not understand, however, that said abrogation, or the adoption of the schedule of May 3, 1897, revoked the established practice relative to rating for incomplete hernia prior to December 4, 1891, under the act of June 27, 1890.

In this report the medical referee concedes this appellant did suffer from an incomplete inguinal hernia at the date of the medical examination, December 16, 1891, made under the first declaration, and further, that the degree of inability for the performance of manual labor caused thereby warrants the allowance of the minimum rate (\$6), but said rate can not be granted for any period prior to December 4, 1891, because the Bureau schedule of rates made on said date for general law pensioners, only provided a rate of \$4 per month for a like condition. The medical referee states, in reference to the schedule of rates allowable under the act of June 27, 1890, that—

It was clearly not intended by the adoption of the schedule of ratings of May 3, 1897, to make the rating of \$6 for incomplete hernia in any case antedate December

4, 1891, while the rating for that condition under the general law prior to that date was only \$4.

Under this method the claim of a person, legally entitled, afflicted with an incomplete inguinal hernia, reaching the Bureau on December 3, 1891, would be rejected; while another reaching the Bureau on December 5, 1891, two days later, would be allowed, although the application of the former may have been forwarded at an earlier date than the latter, but owing to distance and imperfect postal facilities may have been later in reaching the Bureau.

This method or manner of determining title to pension under the provisions of the act of June 27, 1890, would seem to indicate a misapprehension of the intent of the said act, as well as that of March 6, 1896.

The act of June 27, 1890, provides:

That all persons who served ninety days in the military or naval service of the United States during the late war of the rebellion * * * and who are now or who may hereafter be suffering from a mental or physical disability of a permanent character, not the result of their own vicious habits, which incapacitates them from the performance of manual labor in such a degree as to render them unable to earn a support, shall, upon making due proof of the fact * * * be placed upon the list of invalid pensioners of the United States, and be entitled to receive a pension not exceeding twelve dollars per month and not less than six dollars per month, proportioned to the degree of inability to earn a support; and such pension shall commence from the date of filing of the application in the Pension Office, after the passage of this act upon the proof that the disability then existed. * * *

In this act no reference is made as to title to pension under any other law, and distinctly states that pension shall commence from the date of filing the application and upon proof that the disability then existed.

The act of March 6, 1896, is still more specific in reference to the date of commencement of pension under the act of June 27, 1890.

The act of March 6, 1896, provides:

* * * That whenever a claim for pension under the act of June 27, 1890, has been, or shall hereafter be, rejected, suspended, or dismissed, and a new application shall have been, or shall hereafter be, filed, and a pension has been, or shall hereafter be, allowed in such claim, such pension shall date from the time of filing the first application, provided the evidence in the case shall show a pensionable disability to have existed, or to exist, at the time of filing such first application, anything in any law or ruling of the Department to the contrary notwithstanding.

In this connection, attention is also invited to paragraph 13, page 97, of Practice of the Pension Bureau, which reads as follows:

In cases where the bases of the claim under the act of June 27, 1890, was a single hernia, or the loss of sight of one eye, * * * and the certificate of medical examination and other evidence showed the existence of said disability at date of filing such claim, but the claim was rejected under the prevailing practice on the ground that disabilities of that nature did not constitute a ratable disability under the act of June 27, 1890, the adoption of the rule which allows a rate for the said disabilities will operate to vacate the former adverse action, and pensions in such cases will commence at the date of filing the first application, provided the claimant has filed a subsequent application under the act of June 27, 1890.

In the case at bar, it is admitted by the Bureau that a degree of inability for the performance of manual labor warranting the placing the claimant's name upon the list of pensioners did exist at the date of filing his first application for pension, yet pension is denied from said date because a schedule of rates, prepared for an entirely different class of pensioners, provided a rate less in amount for a like condition.

If claims under the act of June 27, 1890, are adjudicated from this standpoint, they are not adjudicated in accordance with the law and the instructions of the Department, based upon the law.

A schedule of rates, for whatever purpose prepared, can not be made to apply in fixing a rate under said act, for it is not a particular pathological condition that is rated, but the degree of inability for the performance of manual labor arising therefrom.

It can readily be seen that the degree of inability for the performance of manual labor caused by an inguinal hernia is not always the same. One person may be unaware that he is ruptured, the condition being first discovered by the examining surgeon; while in another, the hernia, owing to the size of the tumor and relaxed abdominal rings, may be difficult to retain; in another the hernia will be irreducible by reason of adhesions.

For these reasons it is concluded that it is inexpedient to continue in force the schedule of rates dated May 3, 1897, which schedule, it appears, did not receive the approval of the Department.

In fixing rates of pension in claims under the act of June 27, 1890, only the degree of inability for the performance of manual labor, however produced, other than by vicious habits, should be considered, other laws and schedules not being allowed to influence the action.

The papers in this case are herewith returned with the request that the claim under the provisions of the act of March 6, 1896, be readjudicated and pension be made to begin from the date of filing the first application.

The action appealed from is reversed.

SERVICE—REVENUE CUTTERS—COOPERATION WITH THE NAVY.

DANIEL M. MEANS.

The claimant served on board the revenue cutter *Joe Lane*, which was under orders of the President to cooperate with the Navy, but it does not appear that said vessel was ever in actual cooperation therewith.

First Assistant Secretary Thomas Ryan to the Commissioner of Pensions,
January 24, 1900.

On November 28, 1890, Daniel M. Means filed a declaration for pension (No. 14827) under the provisions of the act of June 27, 1890, alleging a disability resulting from rheumatism, chills and fever, rupture, and heart trouble. The service alleged is that of seaman on board the

revenue cutter *Joe Lane* from August 10, 1864, to March 31, 1865, and on board the revenue cutter *Shubrick* from June 1, 1865, to November 30, 1866, each vessel being under orders from the President to cooperate with the Navy during the period of his service.

His claim was adjudicated and rejected on March 16, 1894, on the ground that not being an officer or enlisted man the alleged service would confer no pensionable status upon him under the second section of the act of June 27, 1890.

Assigning said action as error, appeal was taken on May 6, 1898, resting upon the contention that under the rule laid down in the case of William B. Watson (9 P. D., 395), the rejection of his claim was erroneous.

A statement of the service of claimant obtained from the Treasury Department on April 12, 1892, shows that he served on the revenue cutter *Joe Lane* as a seaman from August 10, 1864, to March 31, 1865, and on the *Shubrick* as seaman and quartermaster from June 1, 1865, to November 30, 1866, when his name disappears from the rolls without explanation. The *Joe Lane* was under orders by the President to cooperate with the Navy during the entire period of Means's service thereon.

The evidence in the case is limited to the statement above recited, except that the claimant states the service was rendered on the Pacific coast near or at San Francisco.

The question raised by the appeal, therefore, involves an inquiry as to whether such service, other conditions existing, would confer a pensionable status upon the claimant.

In the case of William B. Watson it was distinctly held, and the case turned upon that question, that there must be proof of actual cooperation with the Navy for the period necessary to give pensionable title under the act of June 27, 1890. In the case of Watson he was shown to have served on board the revenue cutter *Tiger*, and that said vessel during the period of his service was attached to and formed a part of the naval flotilla of the United States operating in the Chesapeake Bay and its tributary waters, a most important theater of action during the war of the rebellion, where it was constantly necessary to protect the capital from approach by the enemy, and also necessary to prevent communication between the Maryland and Virginia shores of the Potomac. No such condition is shown to have existed on the Pacific coast, nor does it appear that the vessels upon which the claimant served were for any length of time actually cooperating with the Navy. The distinction between the Watson case and the one at bar is manifest and the difference is material. It is not sufficient to show that the revenue cutter on which appellant served was under orders to cooperate with the Navy. It must also appear, with reasonable and moral certainty, that such vessel did so cooperate, or a material condition incident to a pensionable status is wanting.

The ground upon which the claim was rejected was, under the rulings which then obtained, thought to be tenable, as the claimant was not an "officer or enlisted man," but under the later rulings is held to be erroneous. In the case at bar, however, the error was immaterial, as the claim should have been rejected upon the ground hereinbefore indicated.

Action affirmed.

ATTORNEYS—RECOGNITION ACT MARCH 3, 1899—FEE—PAYMENT.

MARGARET E. DAVIS (CLAIMANT) *v.* HIRAM A. DAVIS (PENSIONER).

MILO B. STEVENS & CO. (ATTORNEYS).

1. The Commissioner of Pensions can not refuse recognition to agents or attorneys regularly employed by wives or minor children of pensioners who have deserted their wives or children, under the act of March 3, 1899, when such agents or attorneys are authorized to practice before the Department.
2. The method of making payment to agents or attorneys for services in prosecuting an application for the divided payment of a pension under said act are not controlled by sections 3 and 4 of the act of July 4, 1884 (23 Stat., 98), but are matters of agreement and adjustment between the parties over which, in the absence of abuse or misconduct on the part of the agent or attorney justifying disbarment, the Commissioner of Pensions has no authority.
3. Agents and attorneys rendering services in proceedings under said act must look to those by whom they are employed, and not to the Pension Bureau, for payment for their services.

Secretary E. A. Hitchcock to the Commissioner of Pensions, September 5, 1899:

I herewith inclose an opinion given at my request by the Assistant Attorney-General assigned to this Department, upon the questions presented in the appeal of Milo B. Stevens & Co. from your decision upon the application of Margaret E. Davis, presented under the act of March 3, 1899 (30 Stat., 1379), wherein you refused to permit applications under that act by wives or children for the divided payment of the money accruing to the husband or father upon a pension to be prosecuted by agents or attorneys. This opinion has received my approval and has thereby become the departmental decision upon this appeal. The opinion holds that the Commissioner of Pensions can not refuse recognition to agents or attorneys regularly employed by such wives or on behalf of such children, and who are authorized under departmental regulations to practice before this Department. It also holds that the amount and method of making payment of the compensation of agents or attorneys for services in prosecuting an application for the divided payment of a pension under said act are not controlled by sections 3 and 4 of the act of July 4, 1884 (23 Stat., 98), but are matters of agreement and adjustment between the parties, over which, in the absence of abuse or misconduct on the part of the agent

or attorney justifying disbarment, the Commissioner of Pensions has no authority. It follows from this opinion that the divided payment under the act of March 3, 1899, of the moneys accruing upon the pensions therein named must be made to the parties entitled by law to receive the same, without any deduction of the compensation of fees of agents or attorneys, and that agents or attorneys rendering services in proceedings under that act must look to those by whom they are employed, and not to the Pension Bureau, for payment for their services.

[The following is the opinion of the Assistant Attorney-General above referred to.—Ed.]

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE ASSISTANT ATTORNEY-GENERAL,
Washington, September 5, 1899.

THE SECRETARY OF THE INTERIOR.

SIR: Under your reference I have carefully considered the request of the Commissioner of Pensions, made in his letter of June 23, 1899, for a reconsideration of departmental decision of June 10, 1899, reversing the ruling of the Commissioner in refusing to permit applications by wives or children, under the act of March 3, 1899 (30 Stat., 1379), for the payment to them of a portion of the money accruing to the husband or father upon a pension, to be prosecuted by agents or attorneys, even though regularly authorized to practice before the Department of the Interior, and regularly employed by such wives or on behalf of such children.

The action of the Commissioner of Pensions in refusing recognition to such agents and attorneys seems to have been predicated upon the belief entertained by him that the services of agents or attorneys in such cases are not necessary, although his letter states that there will be a contest in nearly every case arising under the act.

The controlling question is, Can the Commissioner of Pensions in his discretion refuse recognition to agents or attorneys who have been regularly employed by such wives or on behalf of such children, and who have been regularly authorized to practice before the Department of the Interior? In my opinion, this question must be answered in the negative.

The practice of permitting claimants and parties in interest to be represented and assisted before the executive departments and their several bureaus by agents and attorneys has existed ever since the organization of these departments, and has often been recognized by Congress. (Act March 2, 1861, 12 Stat., 246; act July 14, 1862, 12 Stat., 566; act July 17, 1862, 12 Stat., 610; act July 4, 1864, 13 Stat., 387; act June 6, 1866, 14 Stat., 56; act July 13, 1866, 14 Stat., 118; joint resolution March 29, 1867, 15 Stat., 26; act April 10, 1869, 16 Stat., 54; act July 8, 1870, 16 Stat., 193; act May 21, 1872, 17 Stat., 137; act June 20, 1878, 20 Stat., 243; act July 4, 1884, 23 Stat., 98; act June 27, 1890, 26 Stat., 182; act March 3, 1891, 26 Stat., 1081; act July 18, 1894, 28 Stat., 113.)

This practice is largely founded in necessity. The personal preparation of the essential application, proofs and other papers is frequently rendered impracticable, if not impossible, by the claimant's or interested party's feeble health, extreme age or youth, limited education, ignorance of departmental regulations and procedure, or imperfect understanding of the laws controlling the particular claim or proceeding and fixing the authority of departmental and bureau officers in the premises. In such instances the employment of competent agents or attorneys becomes prudent, if not indispensable, and the advantages resulting from their employment are not confined to their employers, because the proper preparation and orderly presentation of such applications, proofs, and other papers conformably to law and departmental regulations tends to materially facilitate and simplify the transaction of public business. In a few instances the recognition and compensation, one or both, of such agents or attorneys has been expressly prohibited by Congress (acts of July 29, 1868, 15 Stat., 236; March 19, 1886, 24 Stat., 5; March 3, 1891, 26 Stat., 948; August 5, 1892, 27 Stat., 348), but these have been so exceptional as to enforce the belief that it is intended that the general practice, which has become a sort of departmental common law, shall prevail, except where otherwise directed by Congress. This general practice accords with that which universally prevails in the judicial tribunals of the country, and is especially applicable to the Department of the Interior and its several bureaus, which are clothed by law with many quasi judicial functions (*U. S. v. Scott*, 25 Fed. Rep., 470, 472; *Smelting Co. v. Kemp*, 104 U. S., 636, 640; *Butterworth v. Hoe*, 112 U. S., 50; *U. S. v. Duel*, 172 U. S., 576), upon the enlightened exercise of which depend the enjoyment of many rights, privileges, and bounties recognized or conferred by law.

In an opinion dated October 8, 1866 (12 Op. A. G., 66), Attorney-General Stanbery held that the Secretary of War had no legal authority to exclude authorized agents and attorneys from prosecuting claims for bounties under the act of July 28, 1866 (14 Stat., 310, 322). That act, like the one of March 3, 1899, was silent respecting the recognition of agents and attorneys by the department charged with its administration.

In an opinion rendered October 4, 1869, Attorney-General Hoar (13 Op. A. G., 150), made reference to the opinion just cited, and then said:

That opinion goes to affirm the general right of claimants to transact their business with the Department through the medium of claim agents, where not restrained by statute, together with the corresponding general right of these agents to prosecute before the Department the business which is intrusted to them by their principals. Of the correctness of this view there can be no doubt; and, as a general rule, the Secretary of War can not preclude the possessors of these rights from the enjoyment of them.

But the point now presented is whether, notwithstanding all this, the Secretary may, in his discretion, decline to recognize an agent, or suspend the transaction of

business with him, for "frauds and fraudulent practices" by such agent in the prosecution of claims before the Department.

In my judgment, it is entirely competent to the Secretary to adopt this course, under those circumstances, as a measure for the protection of the public interests committed to his charge. He is not bound to recognize or to do business with any claim agent who is known to have perverted his vocation for the purposes of fraud, and whose character is such that a reasonable degree of confidence can not be placed in his integrity and honesty in dealing with the Government. In the adjustment and payment of claims upon the United States, and especially of pension and bounty claims where the forms and modes prescribed for establishing them are so liable to abuse, the responsibility of a public officer is necessarily very great, and he can not, under the weight of this responsibility, fairly be expected to transact business with an agent whose past conduct throws a suspicion upon the genuineness of every document that comes through his hands, and in whose statements he can repose no reliance whatever. Under circumstances of this kind he may, I think, very properly decline to expose the interests of the Government, as also of claimants, to the danger of becoming a prey to dishonest schemes and devices. Such, I am informed, has long been the practice of the departments, and it is founded upon the very necessity that exists for its adoption in administering the laws relating to the settlement and payment of claims upon the Government as a safeguard against fraud.

Furthermore, it seems to me to be a just and necessary limitation upon the right of a party to be represented by an agent, and to select the agent by whom he will be represented, that he shall not employ a person offensive or dangerous to the other party with whom he is to deal.

This opinion was in turn cited with approval by Attorney-General Devens in an opinion rendered May 13, 1880 (14 Op. A. G., 488), in response to an inquiry from the President respecting the authority of the Secretary of the Interior over the disbarment of attorneys practicing before his Department.

By section 5 of the act of July 4, 1884, *supra*, Congress crystallized into statute law, so far as the Department of the Interior is concerned, the practice theretofore prevailing and the principles announced in these opinions of the Attorney-General. That section reads:

That the Secretary of the Interior may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his Department, and may require of such persons, agents, and attorneys, before being recognized as representatives of claimants, that they show that they are of good moral character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their claims, and such Secretary may, after notice and opportunity for a hearing, suspend or exclude from further practice before his Department any such person, agent, or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall, with intent to defraud in any manner, deceive, mislead, or threaten any claimant, or prospective claimant, by word, circular, letter, or by advertisement.

This section gives unmistakable sanction to the general right of claimants to be represented and assisted before the Department of the Interior by agents and attorneys, but to protect claimants and the Department from the injurious consequences which would follow from the employment and recognition of persons not of good moral character or not in good repute or not possessed of the necessary qualifica-

tions to enable them to render claimants valuable service or not otherwise competent to advise and assist them in the presentation of their claims the Secretary of the Interior is authorized to prescribe rules and regulations governing the recognition or admission to practice of agents, attorneys, and other persons representing claimants before his Department, and he is also authorized, after notice and opportunity for a hearing, to suspend or exclude from further practice before his Department those who by reason of their incompetency, ill repute, refusal to comply with the prescribed rules and regulations, or fraudulent practices ought not to further enjoy that privilege. There is nothing in this section which restricts or authorizes anyone to restrict the right of claimants to be represented and assisted by agents or attorneys, nor is there anything in it which restricts or authorizes anyone to restrict their right to select the agents or attorneys by whom they will be represented and assisted, further than that they shall be persons whose moral character, competency, and compliance with the prescribed rules and regulations are evidenced by their admission to practice before the Department. Neither does the section take or authorize anyone to take from the claimant, the one who must bear the consequences of a mistake, the right to determine whether the employment of an agent or attorney is necessary for the proper presentation of his claim. To hold that the head of one of the bureaus of the Department of the Interior, like the Pension Office, Patent Office, or Land Office, can, in the exercise of his discretion or judgment, say in what claims or classes of claims the services of an agent or attorney are required and will be recognized would be to hold that in the exercise of such discretion and judgment he can say that in no claim or class of claims coming before his bureau are the services of an agent or attorney required, and, therefore, that they will in no case be recognized, thus as to his bureau setting at naught the long-established practice which has received the sanction of Congress.

I am of opinion that, except in those claims where Congress in the exercise of its power has provided otherwise, the Commissioner of Pensions can not refuse recognition to all agents and attorneys, and thus require that the claims be personally prosecuted by the claimants.

Another question which arises under your reference is whether the amount of an agent's or attorney's compensation for services in prosecuting an application for the divided payment of a pension, under the act of March 3, 1899, and the method of making payment of such compensation are controlled and fixed by sections 3 and 4 of the act of July 4, 1884, *supra*. The answer to this question depends upon whether prosecuting such an application is "prosecuting a claim for pension" within the meaning of these sections.

That Congress has the power to fix the compensation of agents and attorneys for services in securing the allowance of a pension, or in procuring the payment, division, or distribution of any pension money, is

fully established by the case of *Frisbie v. United States* (157 U. S., 160, 166), and that in the absence of prohibitive legislation by Congress agents and attorneys may receive from the claimants for their services such compensation as may be agreed upon, is shown by the opinion of Mr. Justice Brewer, in *United States v. Koch* (21 Fed. Rep., p. 873). It is a mere question, then, of the extent to which Congress has exercised its undoubted power. The act of March 3, 1899, is silent respecting the compensation of agents and attorneys, and the only general legislation upon the subject is contained in sections 3 and 4 of the act of July 4, 1884, which provide that only such compensation for services in "prosecuting a claim for pension" may be demanded, received, or paid as the Commissioner of Pensions shall, pursuant to their provisions, direct to be paid; that the compensation shall be \$10 in the absence of a prior written agreement approved by the Commissioner, and not exceeding \$25 in case of a prior and approved written agreement, and that no person shall demand or receive such compensation, or any part thereof, "until such pension * * * shall be allowed." When the pension is allowed, the fee for the prosecution of the claim, if conducted by an agent, attorney, or other person employed by the claimant for that purpose, is earned, but it can be paid only upon the direction of the Commissioner of Pensions, and then only out of the pension money. There is a partial enumeration in these sections of the claims for pension to which they apply, but each claim so enumerated is one which is asserted by the claimant in his or her own right under some statute granting a pension, and is one which, if prosecuted to allowance, will increase the amount of moneys to be paid by the Government under the pension laws, will make the beneficiary a pensioner, and will require the issuance to him or her of a pension certificate.

Section 4766 of the Revised Statutes, of which the act of March 3, 1899, is an amendment, relates exclusively to the payment of pensions, and has nothing to do with the prosecution of claims for pensions. Both the original section and the amendment are confined to pensions which have been allowed; that is, to instances where the claim for pension has passed beyond the stage of prosecution and where all questions relative to the grant of the pension itself have been considered and adjudicated. No grant of a pension is contained in either the original section or in the amendment, and the latter is confined to the enforcement in the instances therein named of a fair division between the pensioner and his family of the money accruing upon a pension which has been claimed and allowed. The sustaining of an application by the wife or children, under the act of March 3, 1899, is not the allowance of a pension, will not require the issuance of a pension certificate, will not increase the amount of moneys to be paid by the Government under the pension laws, and will not make her or them pensioners. The husband or father, as the case may be, will still be the pensioner, will still hold the pension certificate, and when the desertion of his wife or

children ceases, or when he ceases to be an inmate and resident of a State home for soldiers or sailors, or of a national soldiers' home, he will be entitled to receive all moneys accruing upon his pension.

The words "claim for pension" are perhaps susceptible of a broad meaning, which would include the assertion of any right, privilege, or benefit under the pension laws, and would distinguish the claim intended from the assertion of any right, privilege, or benefit under the public land laws or the patent laws, but as employed in the statute under consideration these words seem pretty clearly to have a more restricted meaning, and refer to the assertion of a right to have a pension allowed to the claimant in his or her own right under some law of Congress. The act of March 3, 1899, does not grant a pension, and therefore no claim for pension can be rested thereon.

I am therefore of opinion that the amount and method of making payment of the compensation of agents and attorneys for services in prosecuting an application for the divided payment of a pension, under the act of March 3, 1899, are not controlled or fixed by sections 3 and 4 of the act of July 4, 1884, but fall within the rule announced in *United States v. Koch*, *supra*, viz:

In the absence of a statute prohibiting it, any man may contract for his services; he is not bound to render them; and, rendering them, he may charge the person seeking those services such fee as they may agree upon.

Very respectfully,

WILLIS VAN DEVANTER,
Assistant Attorney-General.

Approved September 5, 1899.

E. A. HITCHCOCK, *Secretary.*

MARRIAGE AND DIVORCE—EVIDENCE—DECREE.

KATE E. RICHARDSON (AS WIDOW).

It appearing from the evidence that the deceased soldier had been lawfully married to another woman prior to his marriage to this appellant, and that said first wife is still living, and there being no sufficient evidence that said first marriage was ever legally dissolved by divorce, this appellant can not be recognized as the widow of the soldier, and is not entitled, under the proof in this case, to pension as such widow under the provisions of section 4702, Revised Statutes.

First Assistant Secretary Thomas Ryan to the Commissioner of Pensions,
January 29, 1900.

Kate E. Richardson filed in the Pension Bureau on May 13, 1896, an application for pension under the provisions of section 4702, Revised Statutes, as widow of Lafayette Richardson (deceased), late private, Company H, Sixth Vermont Volunteer Infantry, alleging the death of said soldier on April 14, 1896, from disease contracted in line of duty during his military service.

Said claim was rejected on May 17, 1898, upon the ground that the

claimant was not the widow of the soldier, he having been previously married to another woman, who was living at the date of his alleged marriage to the claimant, and who is still living, and from whom it has not been shown that the soldier was ever legally divorced.

From said action appeal was taken on May 28, 1898.

The evidence in this case shows, and this fact is admitted, that the deceased soldier was first married in the State of Vermont, where he resided up to a few years prior to his death, soon after the close of the civil war, about 1865 or 1866, to one Marietta Richardson, with whom he lived as his wife in that State, and by whom he had several children, up to about the year 1890, when he deserted her and his family, and went to the State of North Dakota with this appellant, who was a widow, and whose name was then Kate E. Foster, and married the appellant in that State by ceremony on December 31, 1892. It is admitted that at the date of said alleged marriage of the soldier and appellant the first wife, Marietta, was living in the State of Vermont, and she is still living, but it is contended that prior to his second marriage to this appellant the soldier had obtained a decree of divorce from her in the State of North Dakota, on the 13th of the same month in which said marriage occurred, legally dissolving his first marriage.

The validity of said marriage between the soldier and appellant is asserted solely upon the basis of said divorce from his first wife, and as proof of the legal dissolution of said first marriage, the appellant has filed the following certified transcript and copy of a decree and judgment rendered by the district court of Stark County, N. Dak., on December 13, 1892.

STATE OF NORTH DAKOTA, *County of Stark* :

In district court, sixth judicial district.

LAFAYETTE RICHARDSON, PLAINTIFF,	} Judgment.
MARIETTE RICHARDSON, DEFENDANT.	

The above-entitled cause coming on regularly to be heard at a special term of the above-named court, holden at the court-house in the city of Bismarck, county of Burleigh and State of North Dakota, on the 13th day of December, A. D. 1892, L. A. Simpson appearing as attorney for the plaintiff, and there being no appearance on the part of the defendant; and the referee to whom the said case was referred by order of this court, duly entered, having reported the evidence produced, satisfactorily proving the allegations in the plaintiff's complaint contained, and the court being fully advised in the premises, now, on motion of L. A. Simpson, plaintiff's attorney, it is

Ordered, adjudged, and decreed that plaintiff recover judgment against the defendant, dissolving the marriage now existing between plaintiff and defendant; and said marriage is hereby dissolved and plaintiff and defendant are hereby divorced from each other.

Dated December 13, 1892.

By the Court.

(Signed)

Attest.

[SEAL.]

W. H. WINCHESTER, *Judge*.

ED. R. BONNEY, *Clerk*.
By J. P. TINGLE, *Deputy*.

It will be observed that the foregoing decree, or judgment of the North Dakota court purporting to divorce the soldier from his first wife, fails to state on its face any of the jurisdictional facts necessary to give the court jurisdiction of the parties to said suit, or of the matter in controversy, and which are absolutely essential to render it a valid and binding judgment of said court, which could be accepted as evidence of the legal dissolution of said marriage.

In the first place, it fails to set forth that the plaintiff in said suit had been a resident of the State of North Dakota for the requisite length of time required by the statutes of said State to enable him to institute such a proceeding in the courts of said State, or to give the court jurisdiction of the case, and it also fails utterly to state the more essential fact that the defendant had been served with either personal or statutory notice of the institution of said suit, or that any process whatever had issued, or any steps taken to bring the defendant into court.

These are necessary jurisdictional facts which it is absolutely essential should appear on the face of the decree as having been found by the court in order to render said decree valid and binding in law, or before it could be accepted as evidence in any collateral proceeding to show the dissolution of the first marriage of the soldier.

A court must have jurisdiction of the parties, and this fact must appear on the face of the record or its judgment or decree will be a nullity, and it makes no difference where the judgment is set up. (*Gray v. Larrimore*, 4 Shaw, 638; *Lincoln v. Tower*, 2 McL., 473; *Fisher v. Hardin*, 1 Paine, 55.)

The general presumption of law in support of the validity and legality of decrees and judgments of courts of general jurisdiction does not obtain whenever it appears, either from an inspection of the record or by evidence outside of the record, that the defendants were, at the time of the alleged service upon them, beyond the reach of the process of the court; and the burden of establishing the jurisdiction over them of the court rendering such decree or judgment is thrown upon the party who invokes the benefit or protection of such judgment or decree. (*Freeman on Judgments*, 2d edition, sec. 127.)

In the present instance the proof shows beyond all question that the first wife of the deceased soldier resided continuously in the State of Vermont and still lives there; that she was never at anytime in her life in the State of North Dakota, or within the reach of the process of said court rendering the decree of divorce relied upon by this appellant to show a dissolution of the soldier's first marriage, and that she was, as a matter of fact, never served with any notice and never received any information whatever of the institution of said suit or the rendition of said decree of divorce.

There is no evidence whatever in this case showing that the first wife had been served with constructive or statutory notice by publication,

or that the court rendering said decree had acquired jurisdiction over her by any process whatever, either actual or constructive, and the decree itself, which is the only proof offered of said alleged divorce, utterly fails to find or to state that fact, or to show on its face that said court had acquired jurisdiction over the defendant in said suit in any manner.

It is held by this Department that a decree of divorce which on its face shows neither the appearance nor statutory service on the defendant will not be accepted in a pension case to prove the dissolution of a marriage, such decree being void for want of jurisdiction by the court rendering the same. (Nancy E. Scott, 6 P. D., 185.)

It is manifest, therefore, that no sufficient or competent proof of the dissolution of the deceased soldier's first marriage has been offered or produced in this case, and since the first wife was living at the time of the soldier's marriage to this appellant, the evidence in this case clearly fails to establish that said second marriage was legal or that this appellant is the widow of said soldier.

Therefore the rejection of this claim upon the ground stated is held to have been without error and is affirmed accordingly.

FEE—FORFEITURE—INCREASE—ACT MARCH 3, 1891.

SAMUEL WILSON (CLAIMANT).

J. B. CRALLE & CO. (ATTORNEYS).

An attorney, when entitled to a certain sum as a fee, and his title thereto is conceded by the Bureau at the time when a less sum in lieu thereof is certified to him, does not forfeit his right to the remainder of the fee through his failure to enter a protest to said action of the Bureau in not certifying to him the proper amount.

*First Assistant Secretary Thomas Ryan to the Commissioner of Pensions,
January 31, 1900.*

J. B. Cralle & Co., of Washington, D. C., November 23, 1899, entered an appeal from the action of the Bureau in the matter of fee in the issue of September 17, 1894, in the above-entitled claim for increase of pension under the general law of Samuel Wilson, who served in Company D, Ninety-first Pennsylvania Volunteer Infantry.

The claimant was in receipt of pension under the general law at the rate of \$16 per month on account of injury to left hip when, on November 15, 1890, in his behalf the appellants filed a claim for straight increase of pension. The claim was allowed, and on September 17, 1894, certificate issued to allow the rate of \$24 per month on account of injury of left hip, from May 9, 1894, date of holding medical examination. On said issue the appellants were certified a fee of \$2. They contend that as their contract with the claimant for fee was entered into prior to

March 3, 1891 (on which date an act was approved prohibiting the allowance of a fee in excess of \$2 in claims for straight increase of pension), they should be allowed a fee of \$10.

The Bureau concedes the contention of the appellants, but submit that inasmuch as they have acquiesced in the action of the Bureau for over five years, they have forfeited their title to the remainder of the fee. In support of this proposition is cited the decision of the Department in the case of John Henry Judd (33 Fee P. L. Bk., 203), under date of May 15, 1899, where it is held that:

When an attorney acquiesces in the action of the Bureau in the matter of fee on issue to allow pension for a period of more than one year from the date he is notified thereof, he thereby forfeits all title to the fee.

The rule contemplates conditions which may arise in any case similar to those arising in the case in which it was laid down.

In the case of Judd, the issue was as to the appellants' title to any fee on the issue in question. Title to the fee had been determined by the Bureau in favor of another attorney, and appellant notified of its decision in this particular. It was held that, inasmuch as he had acquiesced in the adverse decision of the Bureau for so long a period, he had forfeited his title to the fee, if he ever had one.

Now, in the case under consideration the decision of the Bureau in the matter of fee on the issue of September 17, 1894, was not adverse to the appellant, but was in his favor. He relied upon the Bureau to certify the proper fee. There was no adverse decision of the Bureau for him to acquiesce in. It was for his interest to call the attention of the Bureau to its error, but his neglect does not constitute any forfeiture.

In the case of Daniel Covey (7 P. D., 453) the Department held that an attorney's rights to fee in a claim for increase of pension are derived from the law in force at the time the contract between him and the claimant was entered into. At the time the contract between the claimant and the appellant was entered into the law provided that a fee of \$10 may be certified in a claim for increase under the general law. Subsequently, by act approved March 3, 1891, the rate of fee was reduced to \$2 per month, but this act could not affect their existing contracts for fee. Therefore, the proper fee should be certified the appellant. Accordingly, the action of the Bureau is reversed.

RATES AND RATING, ACT JUNE 27, 1890—PRACTICE.

LUCIUS S. HOLLIS.

Any practice which allows a rating under the act of June 27, 1890, without making the degree of inability to earn a support by manual labor the basis of judgment, is unwarranted by law. (Isaac B. Childers, 358 L. B., p. 396.)

A pensionable condition can not be found because designated by a name of a disease or disability, unless such name or designation carries with it the conclusive fact that it embraces conditions which are of necessity of such a character as to pensionably disable one.

Neither the term "complete inguinal hernia" nor "incomplete inguinal hernia," per se, conveys any specific information by reason of which a rating could be allowed.

*First Assistant Secretary Thomas Ryan to the Commissioner of Pensions,
February 10, 1900.*

Lucius S. Hollis, formerly a private in Company H, One hundred and sixty-sixth Ohio Volunteer Infantry, was refused a rating under the act of June 27, 1890, on April 26, 1896, on the ground of no ratable disability, under declaration filed on October 10, 1894. The rejection was affirmed on appeal in decision promulgated on August 22, 1896. A motion for reconsideration was filed on September 21, 1897, and was overruled on February 26, 1898. Another motion for reconsideration was filed on July 13, 1898, the specific ground of which will appear later in this opinion.

A copy of the departmental opinion of August 22, 1896, is in L. B. 212, page 314, but is not found in the files. Said opinion was based upon the ground that no ratable disability was apparent in claimant's case, the certificate of the examining board dated June 5, 1895, showing his condition to be as follows, viz:

Upon examination we find the following objective conditions: Pulse rate, 92; respiration, 20; temperature, 98½; height, 5 feet 2 inches; weight, 136 pounds; age 51 years.

Has left incomplete inguinal hernia tumor, size of hen's egg; does not pass through external ring but occupies the canal. Ring patulous three-fourths in diameter, wears truss. Has had an iridectomy done on the left eye. Can see light of window but no letter on Snellen's test card at 5 feet. Right eye normal; can read letters marked D X X at 20 feet.

Has had Pott's fracture of the right leg 2½ inches above ankle joint. Measurement same; lateral movements reduced to one-half, painful upon manipulation.

Claimant is fairly well nourished. Muscles firm. Hands soft, equal to light work. No evidence of vicious habits.

The motion for reconsideration overruled on February 26, 1898, simply found that the former opinion was in accordance with the facts and law and upheld the decision.

On July 24, 1896, some nine months after the rejection of the claim hereinbefore referred to, claimant filed another declaration under the act of June 27, 1890, claim being admitted on December 1, 1896, at \$6 per month, by reason of left complete hernia. Said rating was allowed

upon claimant's condition, as shown by the certificate of the examining surgeons dated September 22, 1896, a copy of which is as follows, viz:

Upon examination we find the following objective conditions: Pulse rate, 84; respiration, 18; temperature, 98.6; height, 5 feet 3 inches; weight, 152 pounds; age, 53 years.

Hernia of left side: Claimant has a left complete inguinal hernia. The tumor, of the size of a hen's egg, passes through the external ring. It is reducible and retainable by a properly fitting truss. Specific rating.

Injury of right ankle: There is no deformity of the ankle and apparently no limitation of motion, but claimant complains excessively of pain on passive motion. There are no changes to substantiate this claim. There is no swelling, no redness, no objective evidence of any kind.

Loss of sight of left eye: The vision of the right eye is normal and claimant reads 2040 with that eye. With the left eye at a distance of 3 feet he reads D-80. On the upper and outer side of the cornea are traces of iridectomy. There is also a scar on the lower portion of the cornea with some opacity of the lens. He claims to have received some lime in the eye and this scar is the result. The iridectomy was performed to improve the vision. There is, however, some opacity of the lens and vision is limited to D-80 at 3 feet. Impaired vision of left eye rated 4/18.

Debility: There is no debility. Claimant is well nourished and muscular and he should be able to do ordinary labor.

There is no evidence of vicious habits. Except as above all organs normal.

The present motion is based upon a question of practice (necessarily involving the merits of the case), the gist of the contention being found in the following extract from the motion proper:

We believe that the Department is in error in holding that the loss of sight of one eye, incomplete hernia, and fracture of leg do not warrant a rating under the act of June 27, 1890. It appears to be the present practice of the Pension Bureau to allow a rating of \$6 per month under said act for either the loss of an eye or incomplete hernia. If either of said disabilities, under present practice, would give a man a rating of \$6 per month, we believe that both of them should. We have the honor to request that the medical referee of the Pension Bureau be called on for an opinion as to the practice of the Pension Bureau relative to allowing a rating for said disabilities and the title of the claimant herein.

So far as the law is concerned, as it affects the present or past practice of allowing a rating for a quasi-specific disability, under the act of June 27, 1890, I reiterate what was said in the late case of Isaac B. Childers (10 P. D., 397) wherein the question of scheduled ratings and the foundation on which the one discussed in this motion was based:

A schedule of rates, for whatever purpose prepared, can not be made to apply in fixing a rate under said act, for it is not a particular pathological condition that is rated, but the degree of inability for the performance of manual labor arising therefrom.

This opinion involved the same question that is raised in this motion as to the disability arising from a hernia, and it then was said, in reference thereto:

It can readily be seen that the degree of inability for the performance of manual labor caused by an inguinal hernia is not always the same. One person may be unaware that he is ruptured, the condition being first discovered by an examining

surgeon; while in another, the hernia, owing to the size of the tumor and relaxed abdominal rings, may be difficult to retain; in another the hernia will be irreducible by reason of adhesions.

As far as merits are concerned, the question in the case under discussion is as to the degree of disability, as it affects claimant's capacity to earn his support by manual labor, which was present when he filed his declaration on October 10, 1894. So far as the fracture of the leg is concerned, it is seen that there is no practical disability therefrom. The disadvantage to claimant by reason of such fracture appears to be wholly one of inconvenience. As to the disability by reason of impaired vision of left eye, it is seen, by a comparison of the two certificates hereinbefore set out, that the degree of disability as shown in the earlier certificate is not of a permanent character. On June 10, 1895, he could distinguish light, but could not read any letter on the test card at 5 feet. Fifteen months later, on September 26, 1896, he could read D-80 at 3 feet. It is thus seen that his vision is improving, and consequently the disability therefrom can not be concluded to be of "a permanent character," which is a *sine qua non* under the act of June 27, 1890.

The only other disability is that of hernia, and described by the examining surgeons as a left incomplete hernia, tumor being the size of a hen's egg, which occupies the canal, but does not pass through the external ring.

Now, I think it clearly apparent that neither the disability alone from the hernia described nor the disability from all the abnormal conditions shown would so affect claimant's capacity to earn his support by manual labor as to entitle him to a rating.

It does not matter whether or not it is the present or has been the past practice to allow a rating for a disability known by the term "incomplete inguinal hernia." The terms "incomplete inguinal hernia" and "complete inguinal hernia" are not words or designations which convey information as to any certain degree of disability which may affect a claimant's capacity to earn a support by manual labor. They are merely terms used by the medical fraternity to denote the location, anatomically, of the tumor; carrying with such information, of course, the further fact that claimant is, in common parlance, ruptured. One is no more entitled under the act of June 27, 1890, to any certain rating on account of hernia, complete or incomplete, than he is for varicose veins of the left leg below the knee. It is the degree of disability that determines the pensionable or nonpensionable condition of a claimant, under the law, as shown in the Childers case, *supra*; and if it has been the custom at any time to allow any certain rating without making the degree of inability to earn a support by manual labor the basis for the rating, then, as stated in the Childers case, *supra*, the practice is not a lawful one.

A rating under the act of June 27, 1890, can not lawfully be made

upon any other basis than that the claimant's detailed condition, as shown by the evidence, warrants such a rating. A pensionable condition can not be concluded to be present by reason of a name of a disease or disability unless such name or designation necessarily carries with it the conclusive information that it embraces conditions which are of necessity of such a character as to pensionably disable one.

I am aware that in a Treatise on the Practice of the Pension Bureau (approved by the Secretary on April 9, 1898), on page 97, section 13, reference is made to a "single hernia" in what might be thought to be ambiguous terms, and as perhaps warranting a rating simply for "single hernia." A careful examination, however, of the language used shows that the term "single hernia" is described as "the basis of the claim," and that the language of the section, taken altogether, is not a warrant for allowing a rating simply because of "single hernia." Such may be the basis of a claim, but it is the extent, the detailed conditions of the parts affected by the hernia—that is, the degree of disability by reason of it—that must decide the question of a rating.

By reason of the foregoing I hold that claimant was not entitled to a rating under the first declaration.

The within motion is overruled.

LIMITATION, SECTION 4713, REVISED STATUTES—ANTEREbellion PENSIONS.

MINOR OF SIMON JOHNSON.

The minor's application in this case was filed in 1899. The person on account of whose death the claim is filed died in 1815.

Held, That the claim is barred by the provisions of section 4713, Revised Statutes.

First Assistant Secretary Thomas Ryan to the Commissioner of Pensions, February 13, 1900.

Joseph A. Kelton Johnson, as the minor child of Simon Johnson, deceased, late seaman on privateer *John Adams*, United States Navy, appealed October 11, 1899, from an alleged Bureau action of June 21, 1899, holding that there was no law under which he could be allowed a pension or any arrears of pension by reason of the death of his father in the Navy October 11, 1815, also advising claimant that his mother's claim was rejected in 1871 by reason of her remarriage in 1838.

Claimant, in brief, contends that he is entitled to the pension due his mother, but which she never received, as the widow of said Simon Johnson—claims Nos. 1510 and 2541—and that he is entitled to pension due him after the remarriage of his mother in 1838 as the son and heir at law of Simon Johnson; that he knows of no law barring his claim, and cites the acts of Congress granting the widow or minor child under 16 years of age one-half monthly pay of any officer, seaman, or marine who

had died in service for the term of five years and the various acts extending the five-year period from time to time, and he refers to opinions of ex-Attorney-Generals Wirt and Butler in the widow's claim to the effect that the debt named in said acts becomes as much the property of the widow and children as any bond, etc.

The appeal was considered in part January 12, 1900, when, in view of the absence of face briefs in the case and also in the widow's claim, the papers were returned to the Bureau for a face brief in each case, stating the grounds of rejection in each case.

On January 29, 1900, the papers were returned with the face brief in each case, showing the rejection of the widow's claim, No. 1510, filed June 19, 1871, under the act of July 14, 1862, and also the widow's claim No. 2541, filed May 2, 1871, under the act of February 14, 1871; that both said claims were rejected by Bureau action of January 27, 1900, under section 4713, Revised Statutes, on the ground that no claim was filed within three years of the seaman's death, and as the pension would, therefore, date from the completion of the claim and end at remarriage, there is no pensionable time.

The face brief on the minor's claim, No. 19403, filed June 7, 1899, under the general pension laws then in force, shows that said claim was rejected under section 4713, Revised Statutes, on the ground that no claim was filed within three years of the death of the seaman or of the termination of a pension previously granted on account of his death. As pension would date from completion of the claim, there is no pensionable time before the claimant's majority.

Simon Johnson served as a seaman on board the United States ship *John Adams* from August 31, 1815, to October 11, 1815, the date of his death in service of fever, as shown by the records of the Navy Department.

On April 14, 1856, his widow, Elizabeth Hunt, who had remarried September 6, 1838, and to whom seaman was married November 30, 1808, executed her application for pension under the navy pension laws then in force. Her said application was not filed in the Pension Bureau until June 19, 1871, when it appears to have been approved for rejection by the Bureau December 15, 1871, the ground for rejection not being stated.

On May 2, 1871, said widow filed her second application for "pension provided by the acts of Congress granting pensions to widows." As alleged in her said application, she set forth her said husband's service and death on the United States ship *John Adams* while engaged in the war between the United States and the Dey of Algiers; that prior to said service he had engaged in the war of 1812 with Great Britain on board the privateer ship called the *Shadow*, as she then remembered; that while in the said service, from 1813 to 1815, he was a prisoner in the hands of the British, confined in Dartmoor or Stapleton prison; that said Simon Johnson left a surviving child, Joseph A. Johnson, then

4 years of age, who was still living, and that she had applied for a bounty land warrant in 1855, based on the said services of her husband, which land warrant she received in 1861; that she was married to James Hunt September 6, 1838, who died about March 17, 1850.

This application appears to have been rejected by Bureau action of September 27, 1871, on the ground that claimant remarried subsequent to the death of the seaman for whose services she makes application for pension.

She died August 8, 1874.

On August 7, 1872, the former widow of seaman filed an affidavit which appears to have been treated as an application for widow's pension under the act of July 14, 1862, and subsequent acts, and was rejected by Bureau action of November 20, 1872, evidently upon the ground that claimant had remarried.

The present claimant cites the various navy pension laws from March 3, 1817, to 1871, and contends that the navy pension laws upon which his claim is based are special laws to be dealt with according to their express conditions, and are not subject to the limitations of the general army pension laws.

While it is true that a navy pension act would not be affected by a pension law applicable to the army only, yet navy pensions are subject to a general provision limiting the time when all applications for pension are to be filed.

The time within which the claim for navy pension was required to be filed to entitle the widow to pension from the date of the death of her husband, was limited by section 6 of the act of July 4, 1864, which provided that—

In every case in which a claim for pension shall have been filed more than three years after the discharge or decease of the party on whose account the claim is made, the pension if allowed shall commence from the date of filing the last paper in said case by the party prosecuting the same.

The language of this act, which is now embraced in section 4713, Revised Statutes, is broad, comprehensive, and general in its terms and is applicable to applicants for both army and navy pensions.

The navy pension laws passed for the benefit of the sailors of the war of 1812 are to be construed in *pari materia* with said section 4713, and are subject to limitations of said section, as was held in the case of Sarah H. Ozborn (7 P. D., 317):

It is a well-established rule that where various statutes relate to the same subject they are all to be taken into consideration in construing any one of them, and that all acts in *pari materia* are to be taken together as if they were one law. If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute. *United States v. Freeman* (3 Howard, 565) and authorities therein cited. See also case of Adolph Bernstein, decided May 19, 1894 (7 P. D., 229).

The various statutes upon the subject of pensions, enacted by Congress from time to time, comprise our system of pension laws, in the nature of a code relating to one

subject and governed by one spirit and policy. They are to be construed together, like our revenue laws, banking laws, lands laws, mining laws, patent laws, admiralty, and other similar laws upon a specified subject. And when the later statutes fail to repeal a former in express terms or by necessary implication, such later statutes operate cumulatively and not by way of substitution or repeal.

See, also, authorities cited in the case of George W. Gilbert (9 P. D., 279).

It was held by Acting Attorney-General Phillips (17 Op., 221) that the provisions of section 4713, Revised Statutes, are applicable to half-pay pensions allowable under section 4725, Revised Statutes.

It was held by Secretary Cox, February 19, 1870, in the case of Agnes Wheeler, and by Secretary Kirkwood, in the case of Savilla Athey (8 P. D., o. s., 373), that there being a conflict between said sections 4713 and 4725, Revised Statutes, it is proper to refer to laws existing previous to the enactment of the Revised Statutes, but that no sufficient reason appeared for setting aside the long-established practice, approved by the Department, of commencing renewal of pension, originally allowed under the acts granting five years' half pay, from the date of filing the last paper in the case, where the declaration for renewal was not filed until after three years from the expiration of the prior pension. See case of Matteo Bianchi (9 P. D., 220).

As held by Attorney-General Wirt (10 Op., 562), evidence is not complete while anything of form or substance is wanting, nor until it comes in such shape that its admissibility is unquestionable.

It was held by Secretary Teller, in the case of Josiah W. Clark (9 P. D., o. s., 462), that under section 4713, Revised Statutes, pension was properly commenced from the date of filing the last paper requisite in establishing the claim, the disability having been incurred in service, in 1846, and the claim having been filed in 1880. See also, on the same subject, the cases of Burton Randolph (2 P. D., 335); Isaac S. Warmoth (3 P. D., 324); Widow of Rowland A. Colby (7 P. D., 24).

The opinion of Attorney-General Wirt, cited by claimant, to the effect that the right of the widow to the half-monthly pension for five years, granted by the act of March 4, 1814, was a vested right subject to be defeated and discontinued by her death and marriage at any time within that period, was further coupled with the condition that an application was made within a given time. The language used was as follows:

Nor is there any condition annexed to the promise that the money shall be paid, if applied for in a given time, or in a given state of things.

Claimant cites no specific decision of Attorney-General Butler, but said Attorney-General, in construing the act of July 4, 1837, amendatory of the act of June 7, 1832, and which granted the half-monthly pay to the widows and children, held, in an opinion April 13, 1837, that the right of the widow to a pension under said acts was a vested interest that is not defeated by her neglect to apply for it, and that it goes to

her personal representatives at her death, there being no special provision giving it a different direction.

But it was held by Attorney-General Mason (4 Op. 366), April 22, 1845, that pensions are gratuities.

So also the United States Supreme Court in 1882 held, in the case of *United States v. Teller* (107 U. S., 64), that—

No pensioner has a vested right to his pension. Pensions are bounties of the Government which Congress has the right to give, withhold, distribute, or recall at its discretion, citing the case of *Walton v. Cotton* (19 How., 355).

I am therefore of the opinion that claimant's right to pension is barred by the provisions of said section 4713, Revised Statutes, as his declaration was not filed until 1899, and his father, the seaman, died in 1815.

The action appealed from is accordingly affirmed.

LIMITATION—FEE—ATTORNEYS.

JACOB PAUL (CLAIMANT).

MILO B. STEVENS & CO. (ATTORNEYS).

Order No. 354 of the Commissioner of Pensions is prospective only. Title to fee which had accrued prior to the promulgation of said order can be properly asserted at any time within three years from the promulgation of said order.

First Assistant Secretary Thomas Ryan to the Commissioner of Pensions, February 13, 1900.

Milo B. Stevens & Co., of Washington, D. C., September 21, 1899, entered an appeal from the action of the Bureau in the matter of fee on the issue of December 18, 1889, in the claim for pension under the general law of Jacob Paul, who served in Company K, Fifteenth Illinois Volunteer Infantry.

The records show that on June 4, 1888, the soldier was allowed a pension of \$5 per month under the general law from February 13, 1886, date of filing declaration, on account of disability due to injury of right testicle. In said declaration rheumatism was alleged as of service origin. On said issue a fee of \$25 was paid to T. W. Tallmadge, of Washington, D. C., the attorney in the claim. The claim on account of rheumatism was left pending. On March 28, 1889, the appellants filed articles of agreement for \$25, and on July 30, 1889, filed the soldier's affidavit in which he realleged rheumatism. They filed evidence on October 30, 1888, June 6, July 30, and September 24, 1889. They were advised July 20, 1889, that they would not be recognized in the claim for additional pension on account of rheumatism without the consent of Mr. Tallmadge. On the same date Mr. Tallmadge was called upon for the testimony of the regimental surgeon. Appellants August 3, 1889, filed a protest against the action of the Bureau in refusing them recognition. They were again denied recognition October 25, 1889. Certificate issued December 18, 1889, to allow additional pension on account of

rheumatism. No fee was certified. Mr. Tallmadge was denied a fee on said issue upon the ground that he was paid the full amount to which he was entitled upon the original issue. Appellants filed, June 8, 1898, a call for status. They were denied a fee under order No. 354. Said order reads as follows:

Hereafter (January 15, 1898) requests of attorneys for consideration of title to fees will not be entertained unless filed in this Bureau within three years from the date of issue upon which such fees are claimed.

The order is in limitation of a right. As a prospective measure no good objection can be assigned on the ground of depriving an attorney of his rights in a case, whether he has or has not had notice of the rejection of the claim; for, he is notified by the promulgation of the order to inquire as to the status of any claim in which he believes he has title to a fee, and, as it is proposed to consider such a call for status at intervals of three years as a compliance with the order necessary to preserve his rights to a fee in a case after it has been allowed, the attorney not having been notified of its allowance, I do not perceive wherein any hardship can be worked by the order. But as a retrospective measure, it can not be sanctioned on legal grounds. It destroys existing property rights, deprives an attorney of compensation for services performed, not through his laches, but by a rule limiting the period in which he may set up a claim for his fee and thereby creates a forfeiture of his right out of his delay, which, prior to the issue of the order, did not work a forfeiture.

Limitation laws relate to the remedy and not directly to the right. A law passed subsequent to a contract and changing the period of limitation is not necessarily a law impairing its obligation. (Section 479, Sutherland on Statutory Construction.) Such orders relative to the practice in pension claims, as can properly be made, have the effect of laws; but it is believed that an order of the Commissioner of Pensions, limiting the time in which an attorney may assert a right to a fee, is subject to the same restrictions to which the enactment of any legislative body would be under a constitutional provision that no law should be passed impairing the obligations of a contract. Such a restriction has been construed as including the abolishment of all right to enforce by action at law a vested right. So, where an order is made by the force of which eo instanti existing rights are extinguished, it may well be doubted whether such an order is permissible, in view of the fact that a legislative enactment of such purport would be unconstitutional. Were such an order permissible, it may still be a question whether it would be retroactive. The terms of the order under consideration do not preclude the contemplation alone of future conditions.

Where the intention as to being retrospective is doubtful the statute will be construed as retrospective only. * * * A statute should not receive such construction as to make it impair existing rights, * * * unless such plainly appeared to be the intention of the legislature. In the absence of any such plain expression of design it should be construed as prospective only, although its words are broad

enough in their literal extent to comprehend existing cases. (Sutherland on Statutory Construction, sections 463 and 464.)

The order of the Commissioner of Pensions does not in express terms apply to those cases in which, at the time the order was made, the right to a fee had accrued, and should not, therefore, be construed as including them.

I am therefore of the opinion that the appellants are not prohibited by order No. 354 from asserting their rights to a fee to which their title had accrued at the time said order was made within a period of three years from the promulgation thereof. Therefore, the action of the Bureau in denying appellants a fee in the case under consideration can not be affirmed under said order.

It is manifest that the above rule is not applicable to this case from its terms, as the appellants were never notified of the fact that the claim had been allowed.

It appears that appellants came into the case March 28, 1889, and thereafter rendered material service. The claim was filed February 13, 1886, by T. W. Tallmadge. Therein said attorney had secured an allowance of pension June 4, 1888, or within less than a year prior to the appearance of the appellants in the case. However, the Department held in the case of John O. McNabb (7 P. D., 43)—

Payment to the attorney of the fee agreed upon is full performance of contract on the part of a claimant for pension, and where this has been made, the latter is at liberty to discharge the former from service in further prosecution of a claim based on disabilities not accepted at the time of adjudication.

In this case Mr. Tallmadge was certified a fee of \$25, the full compensation provided by law for the services of an attorney in the prosecution of a claim for pension; hence, there was no bar to the immediate recognition of the appellants. From the report of the Bureau there does not appear any good reason for denying appellants a fee, therefore its action denying them one is reversed.

MARRIAGE AND DIVORCE—EVIDENCE.

SARAH BUCHANAN (WIDOW).

The only evidence of a prior marriage of this sailor being his own statement, in which he says also that he was divorced from such marriage before and was a widower at the time of his formal remarriage to claimant, with whom he lived for twenty-five years thereafter until his death, such remarriage is held to have been a valid one, and claimant his lawful widow, notwithstanding there is no corroborative evidence of such divorce from the prior marriage, or of the first wife's death.

*First Assistant Secretary Thomas Ryan to the Commissioner of Pensions,
February 23, 1900.*

This appellant, Sarah Buchanan, on January 10, 1895, filed a claim, numbered 14908, for pension, under the act of June 27, 1890, as the

widow of Alexander Buchanan, who was a sailor during the war of the rebellion, in the United States Navy, on the vessels *Ohio* and *Taconoy*, and died November 24, 1891.

Said claim was rejected in May, 1898, on the ground of claimant's inability to prove the death or divorce of the sailor's former wife; and she appealed June 24, 1898, contending that the evidence shows he was a widower at the time of her marriage to him.

The only evidence of any prior marriage of the sailor is the record of his marriage to appellant in Allegheny County, Md. (in 1869), which states he was then a widower, and his own statement made in 1892 in response to a "marriage circular" from your Bureau, that there was a "mock marriage" in 1854 to Mrs. Margaret Delay, and a divorce therefrom in 1855 or 1856.

In that response he also gave the names and dates of births of his children, all of whom were born subsequent to his marriage to appellant.

Appellant herself says she never knew or heard anything of a prior marriage until she had filed this claim for pension after his death, when the fact was first brought to her knowledge by the Pension Office. She appears to have lived with the sailor ostensibly and by general recognition as his wife from the time of her marriage to him until his death, a period of twenty-five years; and no one of the witnesses herein, or anyone else, appears to have any knowledge whatever, original or hearsay, of any prior marriage. Special examination failed to disclose any facts concerning it, appellant being unable to furnish any data, having known the sailor for a year only before their marriage. She is a woman of good character and respectability, but quite poor, and dependent upon her own exertions for a livelihood. She was but thirteen years of age at the time of her marriage, while the sailor was thirty-six. He was thought by his employer, from 1867 to 1870, to be unmarried until he married appellant.

The marriage records of New York City, where the sailor lived when on land, from 1853 to 1860, show no marriage in his name; and the court records from 1854 to 1863 show no divorce.

I am of the opinion appellant has satisfactorily established a valid marriage to the deceased sailor. The only evidence of a prior marriage is his own declaration as hereinbefore stated. That statement, however, must, under a well-settled rule of evidence, be taken in its entirety; and so taken, it tends to sustain appellant's marriage, as it shows he was then entirely competent to marry her, so far as the prior marriage was concerned.

This same question of law arose in the appeal of Jane, alleged widow of Bernard J. McMahon, decided June 27, 1898 (L. B., 178, p. 151), in which it was held that the entire statement of a party relative to a certain subject-matter must be considered, although some parts thereof may be favorable to the declarant; citing *Greenleaf on Evidence* (par.

201, note 1); 7 Am. and Eng. Enc. of Law (pp. 70, 73); *Groenawalt v. McEnelly* (85 Pa. St., 352).

And in the claim of *Lodiska*, as widow of *Albert Hyer* (8 P. D., 298), the Department held that the statement of a former wife of said *Hyer* that she was divorced from him prior to his remarriage to the claimant in that case, must be given equal weight with her statement, made at the same time, that she had been married to him; there being, in that case as in this, no other evidence as to the prior marriage and no corroborating evidence as to divorce.

And the courts of the State of Maryland, in which State appellant's marriage to the sailor was duly solemnized in 1869, have likewise held to this generally accepted doctrine that all such simultaneous declarations as to the same subject-matter must be taken, it being the province of the jury to say which, the favorable or the unfavorable, shall govern. (*Bull v. Schuberth*, 2 Md., 38; *Bowie v. Stonestreet*, 6 Md., 418; *Turner v. Jenkins*, 1 H. & G., 161; *Smith v. Wood*, 31 Md., 293; *Reynolds v. Manning*, 15 Md., 510.)

It is also a well-established rule of law that every presumption shall be indulged in order to sustain the validity of a marriage duly entered into, and especially when such marriage has subsisted unquestioned for many years and either party thereto has died; positive proof of the invalidity of such marriage being required in such cases (see decisions cited in *Jennette Burton*, 9 P. D., 31.)

In this case, as already stated, the only evidence of a prior marriage is the testimony of the sailor, and this same testimony shows further that such marriage no longer subsisted at the time of his remarriage to this appellant—a remarriage which subsisted for 25 years, resulting in the birth of seven children, and was unquestioned until after the death of the only party to it who knew of the prior marriage and the only party who is known to have known of it.

Upon this evidence, I am clearly of the opinion that appellant's marriage to the sailor should be held to have been a valid one, and she his lawful widow. Your action is therefore, reversed and you will read-judicate the claim accordingly.

SERVICE IN MEXICAN WAR—ACT JANUARY 29, 1887.

MARY F. MORRISON (WIDOW).

It appearing from the official record of the military service of the deceased soldier during the Mexican war that he was not in the military service of the United States for sixty days during said war, and did not serve for sixty days with the Army of the United States in Mexico, or on the coasts or frontier thereof, or en route thereto during said war, this appellant has no title to pension as his widow under the provisions of the act of January 29, 1887.

First Assistant Secretary Thomas Ryan to the Commissioner of Pensions, February 23, 1900.

Mary F. Morrison filed in the Pension Bureau on July 10, 1896, an application for pension under the provisions of the act of January

29, 1887, as widow of Daniel M. Morrison (deceased), late private, Captain Long's Company, First Texas Mounted Volunteers, Mexican war, alleging the death of said soldier on April 23, 1896, leaving her as his widow surviving, and that he had served for more than sixty days in the Army of the United States during the Mexican war on the frontier of said country, and had been honorably discharged from said service, and had been allowed a pension as a Mexican war survivor under the provisions of said act, which he was in receipt of at the time of his death, and that she was over the age of 62 years at the date of filing said application.

Said application was rejected on November 11, 1896, upon the ground that the deceased soldier did not serve for sixty days in the Army of the United States in Mexico, or on the coasts or frontier thereof, or en route thereto, in the war with that nation, as required by the provisions of the act of January 29, 1887, to entitle his widow to pension thereunder as the widow of a survivor of the Mexican war.

From said action appeal was taken on August 15, 1898.

It is shown by the official record in the War Department of the deceased soldier's military service during the Mexican war that he enlisted as a private in the above-named organization at San Antonio, Tex., on May 3, 1847, and was mustered in on the same date, and served therein at San Antonio, Tex., until June 2, 1847, when he was mustered out with his company and discharged the service at the same place. It furthermore appears that he was allowed for distance traveled from his home to the place of enlistment and rendezvous 430 miles, and from the place of discharge home the same distance, making 860 miles traveled prior to enlistment in and after discharge from the service.

The Auditor of the Treasury for the War Department reports that the records of his office show that the deceased soldier was enrolled and mustered into the service on May 3, 1847, at San Antonio, Tex., as a private, and was discharged at San Antonio, Tex., June 2, 1847, and was paid for one month's service, \$8, and for traveling 860 miles prior to enrollment and muster and after discharge, forty-two days, \$60.20. It is furthermore stated by the Auditor that said deceased soldier filed a claim for extra pay in his office on February 1, 1886, which was disallowed on the ground "that the soldier was not in actual service during the war with Mexico, nor engaged in the prosecution of said war."

The act of January 29, 1887, requires as a prerequisite to title to pension thereunder an actual service of sixty days with the Army or Navy of the United States in Mexico, or on the coasts or frontier thereof, or en route thereto, in the war with that nation, and it is manifest from the foregoing official record of the service of the deceased soldier in the Mexican war that he was actually in the military service of the United States for a period of but thirty-one days.

It is contended by appellant that the time for which the soldier was

allowed travel pay should be counted and considered as part of his actual military service in the Mexican war and added to the time from his enrollment to discharge, to make up the necessary length of service required by the act; but it is too manifest for argument that the soldier could not be held to be in the military service of the United States or to have performed actual military service with the Army of the United States prior to his enlistment, or enrollment (which is the same thing), in said service, or after his discharge from and muster out of said service with his company. The act, by its express terms, applies only to such soldiers as "being duly enlisted, actually served sixty days * * * and were honorably discharged;" consequently no service rendered, or time expended in travel prior to enlistment or after discharge, could by any possibility be taken into consideration to make up the requisite period of pensionable service under said act.

It is true, as contended by appellant, that the deceased soldier was himself pensioned under the provisions of said act as a Mexican war survivor, upon the theory that the time for which he was allowed travel pay should be computed as part of his actual military service; but this allowance of pension was clearly erroneous under the admitted facts of this case and unwarranted by the law, and was evidently mistakenly made under a ruling of the Commissioner of Pensions which related to time consumed in travel to the place of rendezvous and muster after enlistment, and which had no application whatever to the facts of this case.

The time for which travel pay was allowed prior to enlistment, or enrollment, and after discharge and disbandment of the organization to which the soldier belonged, can under no circumstances be taken and counted as part of the sixty days' actual military service required by the act of January 29, 1887, to give title to pension thereunder.

It is unfortunate that the erroneous allowance of pension to the deceased husband of appellant should have been made, but because an error was then committed is no sufficient reason for perpetuating said error by allowing a pension to his widow which is not warranted by the terms of the law.

The appellant cites the decision of this Department in the case of Elizabeth, widow of William F. Young (9 P. D., 44), as applicable to her case, and contends that the rejection of her claim is inconsistent with said decision.

The facts in the Young case are, however, widely different from those of the present one. In the Young case it was shown that the soldier enlisted in an Illinois regiment for the war with Mexico, and was forwarded to his command at the seat of war, and was there discharged after joining his regiment, and it was held that he was en route to Mexico from the date of his enlistment, the time occupied in travel after enlistment until he joined his regiment on the frontier of Mexico being properly computed as part of his actual military service with the Army

of the United States en route to Mexico. In the present case, as has been hereinbefore pointed out, the full time shown by the official record of the deceased soldier's military service during the war with Mexico, from the date of his enlistment to the date he was discharged and mustered out of the service with his company, was but thirty-one days, and it is, therefore, evident that the decision in the Young case can have no application whatever.

In view of the foregoing, I am clearly of the opinion that the rejection of the appellant's claim for pension under the act of January 29, 1887, as widow of the deceased soldier, upon the ground stated, was not error, and said action is affirmed accordingly.

FEE—RANK—RATING.

SARAH O. STOCKWELL (MOTHER).

MILO B. STEVENS & Co. (ATTORNEYS).

A fee in excess of \$10 can not be paid in a dependent mother's or any other case under act of June 27, 1890.

*First Assistant Secretary Thomas Ryan to the Commissioner of Pensions,
February 23, 1900.*

Milo B. Stevens & Co., of Detroit, Mich., October 28, 1899, entered an appeal from the action of the Bureau in the matter of fee on the issue of September 7, 1899, in the claim for a dependent relative's pension under the first section of the act of June 27, 1890, amending section 4707, Revised Statutes, of Sarah O. Stockwell as mother of Samuel J. Stockwell, Company M, Thirty-second Michigan Volunteer Infantry, war with Spain.

The appellants, September 2, 1898, in behalf of the claimant, filed a declaration for a dependent mother's pension under the provisions of the first section of the act of June 27, 1890, amending section 4707, Revised Statutes; and on July 24, 1899, they filed articles of agreement for \$25. On issue to allow pension under said act they were certified a fee of \$10 only, hence this appeal.

From an examination of this case it is found that the declaration for pension is under the provisions of the act of June 27, 1890, and the pension was allowed under the provisions of that act.

In the appeal citations are made from the decisions of this Department in the case of Elizabeth Darling (10 P. D., 244), where it is held as follows:

I am clearly of the opinion that there is no authority of law for granting a dependent parent's pension under the act of June 27, 1890, as the right to pension dependents is derived from the provisions of section 4707, Revised Statutes, as amended by the first section of the act of June 27, 1890. Section 4707 alone fixes the rate and is the granting act.

Considerable ingenuity would be exercised in arriving at the conclusion that the foregoing implies that an allowance of pension is not provided by the first section of the act of June 27, 1890, to a class who were not entitled under the provisions of the section 4707, Revised Statutes, and when once reached it is apparent that no person would be entitled to pension under the former unless entitled under the latter. I think it is hardly necessary to do more than call attention to the difference in the meaning of the words "grant" and "allowance" to make it clear that pension granted by the provisions of section 4707, Revised Statutes, may be allowed to persons specified in the first section of the act of June 27, 1890; or, in other words, the grant of the pension to be allowed by the provisions of the first section of the act of June 27, 1890, is found in section 4707, Revised Statutes. Keeping in mind the specific meaning of the words "granted" and "allowed" in the connection in which they are used, while reading the fourth section of the act of June 27, 1890, and no conflict will arise between the clearly expressed intent of said section and the decision of the Department in the Darling case.

The fourth section of the act of June 27, 1890, reads as follows:

That no agent, attorney, or other person engaged in preparing, presenting, or prosecuting any claim under the provisions of this act shall directly or indirectly contract for, demand, receive, or retain for such services in preparing, presenting, or prosecuting such claim a sum greater than \$10. * * *

When pension is allowed by the provisions of the first section of the act of June 27, 1890, claims therefor must be prosecuted under its provisions. I do not think it is an assumption to say that pension is allowed by the provisions of said action, as the action itself reads—

That all pensions allowed to dependent parents under this act shall commence from the date of filing the application therefor.

So we have a statement that pension is allowed under the provisions of the first section of the act of June 27, 1890, and an expressed mandate of law that a fee greater than \$10 shall not be paid an attorney for securing an allowance of pension under the act of June 27, 1890. However, it is an assumption to say for the reason that the grant of pension to the class of persons specified in the first section of the act of June 27, 1890, is not found in said act, but is found in section 4707, Revised Statutes, and therefore such fee should be paid for securing an allowance of pension under the provisions of the former as may be paid for securing pensions under the provisions of the latter, as the statement finds no support on any principle upon which the construction of a law is founded.

It has been held that rank in the service shall be considered in applications filed under the first section of the act of June 27, 1890, though in the second section of said act it is expressly provided that "rank in the service shall not be considered in applications filed under this act." Now, it may be submitted that other general provisions of

the act of June 27, 1890, but not found in section 1 thereof, have no application to the allowance of pension provided by said section, and therefore the provisions of section 4 of said act relative to the payment of fees for securing the allowance of pension under the provisions of said act have no application to the payment of fees for securing an allowance of pension under the first section of the act. The argument does not appear susceptible of being carried any further than that, because if one proposition is true the other must also be true.

One of the essential reasons for holding that rank in the service must be considered in applications filed under the first section of the act of June 27, 1890, is that no rate of pension was provided by said act for that class of pensioners created by the first section thereof, therefore recourse must be had to the act containing the grant of pensions to the class created by said first section; that is, to the act of which section 4707, Revised Statutes, constituted a part. There was no uniform rate provided for all persons coming within the provisions of said section 4707, but different rates were provided, varying from \$8 to \$30 per month, according to the total rate provided as pension for the soldier on account of whose services and death the claim was made. Now, it is apparent that if recourse was had to the provisions of the general law with the view of ascertaining what uniform rate should be allowed to all persons pensioned under the provisions of the first section of the act of June 27, 1890, a person would be confronted with still another question, viz, whether the rate should be \$8 per month, or \$30, or some intermediate sum provided as a rate for the widows or dependent relatives of an officer according to his rank. There would be as much authority in law for selecting the highest as there would be for the lowest rate. The selection, therefore, would be mere guesswork, not an interpretation of the law. However, if the second proviso to the second section of the act of June 27, 1890, viz, "that rank in the service shall not be considered in applications filed under this act," does not relate to those applications filed under a section thereof which did not provide the rate to be allowed in the claims thereunder, then it would be clear that, inasmuch as recourse must be had to the granting act for the rate, rank in the service would be considered in applications filed under that particular section of the act. It is unnecessary to recite the course of reasoning and the facts considered in determining that said proviso did not relate to applications filed under said section, any further than I have already set forth such reasons. They are set forth in the Darling case at length and need not be repeated here. It suffices to say here that nothing will be found in the Darling case that will support the proposition that the provisions of section 4 of the act of June 27, 1890, do not relate to applications made under the first section of the act of June 27, 1890, as well as under the second and third sections thereof; nor nothing from which can be deduced, by any parity of reasoning, that because the second proviso of the second

section of the act of June 27, 1890, does not relate to applications filed under the first section thereof, therefore the provisions of the fourth section of said act does not apply to the payment of fees for prosecuting claims for pension allowed under the provisions of said first section.

I therefore adhere to my decision in the case of Stewart Peoples, as dependent father of John J. Peoples, under date of March 24, 1899 (32 Fee P. L. Bk., p. 395). I there held that—

For the prosecution of any claim for pension under the provisions of the act of June 27, 1890, a fee in excess of \$10 can not be paid.

Therefore the appellants' contract for the payment of a larger fee than \$10 in this case is invalid, and they take nothing thereby. The action of the Bureau in refusing to certify a sum in excess of \$10 as a fee in this case is affirmed.

MARRIAGE—EVIDENCE—MARYLAND.

MOLLIE PURNELL (WIDOW).

It is only when a party relies upon a valid marriage ceremony that, under the Maryland decisions, the same proof of cohabitation, general reputation, and acknowledgment which will establish a marriage good at common law will establish the presumption of a religious ceremonial marriage in that State.

First Assistant Secretary Thomas Ryan to the Commissioner of Pensions, February 27, 1900.

The appellant, Mollie Purnell, on November 23, 1897, filed a claim for pension under the act of June 27, 1890, as widow of Jacob Purnell, who served in Company D, Ninth United States Colored Volunteer Infantry.

The appellant, by affidavit, set forth that she was married in the State of Maryland to the soldier by a colored minister about 1858; that she and the soldier were slaves at the time of their marriage, and then and ever since have resided in the State of Maryland. She further set forth that there was no record of the marriage, no license was procured, the minister who performed the ceremony is dead, and that other witnesses to the ceremony are dead. Thereupon she filed evidence of her friends, neighbors, and acquaintances tending to show that for over thirty-five years she and soldier had lived together as man and wife; that up to the time of his death were recognized as man and wife by the witnesses, and that she and soldier had declared their relation to be that of man and wife during the whole of said period. Appellant was called upon for evidence as to the consent of her master and of soldier's to their marriage. Under oath appellant stated that such evidence could not be obtained other than her own testimony, but averred that such consent was obtained. On May 13, 1898, the claim was rejected upon the ground that appellant is unable to show she is

the legal widow of the soldier, "she declaring her inability to furnish evidence showing that they were married with the consent of their masters." From this action an appeal was entered June 20, 1898.

In the case of Lettie Hawkins, colored (8 P. D., 22), the Department held as follows:

Where such widow (the widow of a colored soldier) applies for pension under section 3 of the act of June 27, 1890, section 4705, Revised Statutes, has no application, and the widow must prove her marriage by *lex loci*.

Third. The laws of Maryland do not recognize marriages under common law rules. (*Denison v. Denison*, 35 Md., 361.)

In the case of Hawkins the evidence was directed to show that soldier and appellant had lived together as husband and wife, and the contention was that under common law the appellant and soldier's relations were matrimonial. There was no reliance upon any ceremonial marriage to prove which evidence of having lived together as husband and wife and reputation as such was adduced to raise a presumption that they had been married in the manner specified by the laws of the State of Maryland. It is in this particular that the evidence radically differs from that adduced in the case of Rebecca Wiley (10 P. D., 304), where a ceremonial marriage was relied upon and the question was whether such marriage was proven. In the Wiley case it was held that—

Under the Maryland decisions, the same proof of cohabitation, general reputation, and acknowledgment, that will establish a marriage good at common law, will establish the presumption of a religious ceremonial marriage in that State.

The laws of the State of Maryland provide as follows:

[Code of 1878, article 51.]

MARRIAGES.

SECTION 4. The rights of marriage between any white persons, citizens or inhabitants of this State, shall not be celebrated by any person without this State, unless by some minister of the gospel, ordained according to the rites and ceremonies of his or her church, or in such manner as is usual and practiced by the society of people called Quakers.

SECTION 9. All marriages heretofore made and celebrated in this State by and between colored people are hereby confirmed and made valid to every intent and purpose from the time of the celebration of such marriages, respectively; and every such marriage shall be held and taken by all courts of this State to be good and sufficient in law to all intents and purposes, provided that in every case the parties claiming to have been married by a competent person shall, by sufficient proof before some justice of the peace, establish the fact of having been so married, a certificate of which shall be filed with the clerk of the circuit court of the county in which said marriage was celebrated, or the court of common pleas of Baltimore City, and be preserved with the register of marriage licenses in the office of said clerk.

SECTION 10. In all marriages hereafter celebrated between colored persons the parties, or some one in their behalf, shall present to the clergyman solemnizing the rites of a marriage a license, as required in other cases of marriage; and any such clergyman is hereby prohibited from solemnizing such marriages without the production of licenses,

Sections 9 and 10 were enacted in 1867.

The ceremonial marriage upon which a party relies must be a legal one. The appellant states that she was married to the soldier when slaves, in 1858, in the State of Maryland. Accepting her statement of the fact as proof thereof, and for the purposes of the question at issue assuming that she relies upon such ceremony, it still must be shown that section 9 *supra* is complied with for this reason: The appellant and soldier were slaves at the time the ceremony was performed; they had not the capacity to contract a marriage. (See case of Patsey Washington, widow, 8 P. D., 363.) Now the statute requires that something be done to make the ceremony a legal one. There is no proof, nor is it asserted, that the statute was ever complied with. There is no legal marriage, under the laws of Maryland, where the parties resided and were slaves, unless they have fulfilled the requirements of the statute. Hence, appellant does not rely upon a marriage entered into in accordance with the laws of Maryland—upon a valid marriage ceremony. Therefore no presumption of such marriage arises from proof of cohabitation as man and wife and representation and repute as such, in the absence of reliance upon a ceremonial marriage in accord with the statute. In other words, marriage by ceremony in accordance with the provisions of existing statute laws can not be presumed when there is no pretense that such marriage ever took place. Hence, evidence adduced in a case under the foregoing conditions can not be accepted to prove such marriage; no presumption of its having taken place can arise—there is nothing to build upon.

Attention is called to the fact that the Bureau assigned the want of proof of the masters' consent to the slave marriage of appellant in rejecting the claim. Proof of their assent would tend to show that a marriage ceremony was performed, and for the want of better proof might possibly be accepted as sufficient for that purpose. It is apparent that the reason assigned does not support the ground of rejection and is wholly immaterial.

The evidence is insufficient to show that the appellant is the legal wife of the soldier.

Action affirmed.

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JURISDICTION—NOTICE—DECREE—DIVORCE.

EMMA M. COOPER (WIDOW).

The widow's claim was rejected on the ground that her husband obtained a divorce from her in the State of Colorado while she resided in Massachusetts. The transcript of the record fails to show affirmatively that a copy of the summons in the divorce proceedings was mailed to her, although her post-office address was known.

This statutory requirement being omitted, it is fatal to the jurisdiction of the court.

First Assistant Secretary Thomas Ryan to the Commissioner of Pensions, March 10, 1900.

Charles H. Cooper, formerly of Company G, Forty-second Massachusetts Volunteer Infantry, died on June 16, 1894, and on April 13, 1896, Emma M. Cooper filed a declaration for widow's pension under the provisions of the act of June 27, 1890, alleging that she is the surviving widow of the soldier.

Her claim was rejected on May 10, 1898, on the ground that the soldier obtained a divorce from her on July 29, 1889. It also appears that Sophia M. Cooper, who married the soldier subsequent to the last-mentioned date, is an applicant for pension under said act as the widow of said soldier.

Emma M. Cooper, by her attorney, on June 14, 1898, appealed from the action rejecting her claim, contending that the divorce above referred to was fraudulent and rendered by a court which had no jurisdiction in the matter. The facts recited in the contention are fully set forth in the statement containing a transcript of the record of the divorce proceedings, prepared by the chief of the law division of the Bureau of Pensions, as follows:

Herewith are returned the papers in the above-mentioned claim. The case was sent to the law division for the purpose of an opinion as to claimant's legal widowhood.

The facts in the case may be briefly summarized as follows:

It appears that the soldier married claimant, Emma M. Cooper, at Holyoke, Mass., December 12, 1869; that they lived and cohabited together as husband and wife up to some time in 1888, when, by reason of ill health, he went to Denver, Colo.; that, prior to his departure for Colorado, the soldier had been employed in the Lyman Mills, at Holyoke, Mass., and that his home was a tenement belonging to said corporation; that he left this claimant in said corporation tenement, and she remained in same, keeping it ready for his return; that some time in August, 1888, he returned from Colorado to Massachusetts, and found the claimant at his home where he had left her less than six months before; that it was then he decided not to remain East, and, giving up his position in the Lyman Mill, he was also obliged to give up the corporation tenement, which the soldier did, and moved the claimant to her sister's, and remained there with claimant until the last of September or the first of October, 1888, when he again returned to Colorado; that claimant's first letter from the soldier after his return to Colorado was dated November 1, 1888, and the last letter from him was dated March 11, 1889, but was not mailed until March 14, 1889; that

the next claimant heard of the soldier was that he had obtained a divorce from her, and later learned that he applied for divorce on April 20, 1889, and it was granted July 29, 1889; that claimant contends that she was residing at No. 267 Walnut street, Holyoke, Mass., with her sister, from the time her husband moved there with her in 1888, until December, 1889; that she was residing at said address when the soldier instituted divorce proceedings and during their pendency; that she wrote to the soldier every week, but her letters were never answered or returned by the postal authorities, and further contends that she never received a copy of the Rocky Mountain Herald or heard of the application for divorce.

The following is a certified transcript of the divorce proceedings had between the soldier and this claimant:

UNITED STATES OF AMERICA.

STATE OF COLORADO, *Arapahoe County*, ss:

In county court, September term, A. D. 1889.

Pleas before the Hon. George W. Miller, judge of the county court, within and for the county of Arapahoe, State aforesaid, and at a term thereof begun and held at the court-house in the city of Denver, in said county, on the first Monday (being the second day) of September in the year of our Lord, 1889, and of the independence of the United States the one hundred and fourteenth.

Present: Hon. GEORGE W. MILLER, judge; ALBERT H. WEBER, sheriff.

Attest: WILLIAM R. PERRY, Clerk.

Be it remembered that upon, to wit, the 20th day of April, A. D. 1889, the same being one of the regular days of the March term, A. D. 1889, of said court, the plaintiff filed herein the following complaint, which is in words and figures as follows, to wit:

STATE OF COLORADO, *Arapahoe County*, ss:

In the county court.

CHARLES H. COOPER, PLAINTIFF, v. EMOLINE M. COOPER, DEFENDANT.

The plaintiff complains of the defendant and alleges that the plaintiff is now and, for one whole year immediately preceding the institution of this suit, he has been an actual bona fide resident of the State of Colorado, and that he does not ask or seek to recover alimony in this action in excess of \$2,000, or in any sum whatever.

That on or about the 12th day of December, A. D. 1869, the plaintiff and defendant lawfully intermarried at Belchertown in the State of Massachusetts, and ever since have been and are now husband and wife.

That at all times since said marriage plaintiff has treated defendant with uniform kindness and affection, but that the defendant, unmindful of her marriage vows and obligations, has since said marriage been guilty of extreme cruelty toward the plaintiff.

That shortly after said marriage the defendant began to exhibit a most violent temper, and a cross, petulant, quarrelsome, and mean disposition, which so far from improving as their marriage life progressed, has steadily grown worse until the plaintiff's life with the defendant has become unbearable.

That when in the presence of company the defendant was unusually pleasant toward plaintiff, but when alone in their home she was invariably ugly, surly, snappish, and unkind to plaintiff, and apparently in every way endeavored to render his life disagreeable and unpleasant. That as a rule when plaintiff spoke to her, she would give him a surly, mean answer, or snap him up without any cause or provocation whatever, so that it was utterly impossible for him to converse with her, or to carry on a conversation as husband and wife usually do.

That whenever he would endeavor to be pleasant and cheerful, the defendant would be cross and churlish, and when the plaintiff would caress her, she would answer or meet his caress with a sneer or a snarl, and repulse him.

That ever since their marriage the defendant has been a chronic fault-finder, and afflicted with a disposition to find fault with and belittle the plaintiff, so much so as to make their wedded life one continuous wrangle, and their home desolate and dreary.

That on one occasion when the plaintiff, on a Fourth of July, happened to remark to the defendant that he had spent 25 cents with some friends, she flew into a violent passion and quarreled and abused him about it as though he had committed some grave offense.

That on another occasion when they were about to sit down to a Thanksgiving dinner, the plaintiff having said to defendant that a friend had invited him to take a drink at his house, and that he had taken one, the defendant again flew into a passion and so abused the defendant that he was compelled to leave his dinner untasted and quit the house.

That on another occasion when the plaintiff's sister and her husband were at the plaintiff's house by invitation, the defendant by her insulting remarks drove them away.

That during all their married life the defendant has been accustomed to make in the plaintiff's presence slighting and slurring remarks about the plaintiff and his family.

Plaintiff further alleges that the defendant has never since said marriage shown or exhibited any affection for him, but on the contrary has repeatedly by her action, words, and conduct shown that she had no love or regard for him.

That defendant has repeatedly said to plaintiff that she married him solely for a home and cared nothing for him.

That on one occasion when the plaintiff returned to defendant, after an absence of six months, having been compelled to leave on account of sickness, the defendant barely greeted him with a shake of the hand and gave him no caress whatever.

That on one occasion when the plaintiff was sick and suffering with bronchitis, the defendant left him and was out on the street for about two hours when he required her attention.

Plaintiff further alleges that he has always provided liberally, for a man of his means, for his said wife, and has tried to make their home comfortable and happy, but that his efforts in that behalf have been frustrated by the conduct of defendant.

That defendant's conduct toward the plaintiff was so disagreeable and her treatment of him so mean that it became impossible for them to cohabit together, and that they have not cohabited together as man and wife since the 20th day of February, 1883.

Wherefore plaintiff prays that he may be divorced from the defendant and that the contract of marriage aforesaid may be dissolved, set aside, and for naught held, and for general relief.

THOS. W. LIPSCOMB,
Attorney for Plaintiff.

STATE OF COLORADO, *Arapahoe County, ss:*

Charles H. Cooper, of lawful age, being duly sworn, on oath says he is the plaintiff in the above-entitled cause, that he has read the foregoing complaint and is acquainted with the contents thereof, and that the same is true of his own knowledge.

CHAS. H. COOPER.

Subscribed and sworn to before me this 19th day of April, A. D. 1889.

[SEAL.]

JOHN W. MCHENRY,
Notary Public, Arapahoe County, Colo.

My commission expires February 11, 1893.

And upon, to wit, the 1st day of May, A. D. 1889, the same being one of the regular days of the May term, A. D. 1889, the following summons, which was issued April 20, A. D. 1889, was returned and filed in said court, and is in words and figures as follows, to wit:

STATE OF COLORADO, *Arapahoe County*, ss:

In the county court in and for said county.

CHARLES H. COOPER, PLAINTIFF, v. EMOLINE M. COOPER, DEFENDANT. SUMMONS.

The people of the State of Colorado to the defendant above named, greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the county court of Arapahoe County, State of Colorado, and answer the complaint therein, which is filed in the office of the clerk of the said court, within twenty days after service hereof, if you are served within said county; or, if you are served out of said county, or by publication, then within forty days after service hereof, exclusive of the day of service. If a copy of the complaint is not served with this summons, or if the service hereof is by publication, you are by law allowed ten days additional to the time above mentioned in which to appear and answer.

If you fail to answer the complaint within the time aforesaid, exclusive of the day of service, judgment by default will be taken against you according to the prayer of the complaint, to wit: For a decree of said court in favor of the plaintiff and against the defendant, divorcing the plaintiff from the defendant and dissolving the bonds of matrimony and the contract of marriage heretofore entered into between the plaintiff and defendant, and for general relief.

The general nature of said action is this, to wit: The said action is brought by the plaintiff, Charles H. Cooper, for the purpose of procuring a decree of said court in favor of the plaintiff, divorcing the plaintiff from said defendant, Emoline M. Cooper, and dissolving the bonds of matrimony and the contract of marriage heretofore entered into and subsisting between them, on the ground that the said defendant, Emoline M. Cooper, has, during said marriage, been guilty of extreme cruelty toward the plaintiff, Charles H. Cooper, and that because of said cruelty the plaintiff is entitled to a divorce from defendant.

Given under my hand and seal of county court at Denver, Colo., this 20th day of April, A. D. 1889.

[SEAL.]

WM. R. PERRY, *Clerk*.

STATE OF COLORADO, *Arapahoe County*, ss:

MAY 1, A. D. 1889.

I do hereby certify that I have had the within summons in my possession for ten days last past, and after diligent search during that time the within-named defendant, Emoline M. Cooper, was not found in my county. This summons is therefore returned without service, this 1st day of May, A. D. 1889.

A. H. WEBER, *Sheriff*,
By H. WEBER, *Deputy*.

And afterwards, upon, to wit, the 2d day of May, A. D. 1889, the following affidavit was filed by said plaintiff, and is in words and figures as follows, to-wit:

STATE OF COLORADO, *Arapahoe County*, ss:

In the county court.

CHARLES H. COOPER, PLAINTIFF, vs. EMOLINE M. COOPER, DEFENDANT.

Charles H. Cooper, of lawful age, being duly sworn, on oath says that he is the plaintiff in the above-entitled action; that summons has been duly issued in said

action, and placed in the hands of the sheriff of Arapahoe County aforesaid, and return made thereon not less than ten days after the issue of said summons; that said summons was issued as aforesaid, on the 20th day of April, A. D. 1889, and return thereof made on the 1st day of May, A. D. 1889; that the defendant, after diligent search, can not be found, all of which appears among the files in cause.

That the complaint in said action was filed in said court with the clerk thereof on the 20th day of April, 1889.

That said action is brought by the plaintiff to obtain a decree of said court in favor of the plaintiff and against the defendant, divorcing plaintiff from said defendant, Emoline M. Cooper, and dissolving the bonds of matrimony and the contract of marriage heretofore entered into and subsisting between them, on the ground that the said defendant has since marriage been guilty of extreme cruelty toward plaintiff.

Affiant further states that the defendant resides out of the State of Colorado, and now resides in the city of Holyoke, Mass. That the defendant's post-office address is Holyoke, Mass., and that she is a necessary party to this action.

That personal service of said summons can not be made on said defendant, Emoline M. Cooper.

Wherefore he prays for an order that service of the same may be made by publication thereof.

CHAS. H. COOPER.

Subscribed and sworn to before me this 1st day of May, A. D. 1889.

[SEAL.]

JOHN W. MCHENRY,

Notary Public, Arapahoe County, Colorado.

My commission expires February 11, 1893.

And thereupon the following order was had and entered of record in said court, to wit:

CHARLES H. COOPER v. EMOLINE M. COOPER. DIVORCE. 11223.

Now on this day it appearing to the satisfaction of the clerk from the affidavit of the plaintiff filed herein that the defendant is a nonresident of the State of Colorado, that there is a proper cause of action existing against said defendant, and that there is proper cause for this order, it is ordered that service of summons be made by publication in the Rocky Mountain Herald, a weekly newspaper printed and published in Denver, Arapahoe County, Colo., hereby designated as the paper most likely to give notice to said defendant; that said publication be made at least once a week for four successive weeks, and that a copy of said summons be forthwith deposited in the post-office at Denver, directed to said defendant at Holyoke, Mass., her present post-office.

WM. R. PERRY, *Clerk.*

Publisher's proof of publication.

STATE OF COLORADO, *Arapahoe County, ss.:*

I, H. M. Rhoads, do solemnly swear that I am the publisher of the Rocky Mountain Herald, a weekly newspaper printed in Denver, county of Arapahoe and State of Colorado, and that the annexed notice was published in the regular and entire issue of every number of said weekly paper for the period of — consecutive insertions; and that the first publication of said notice was in the issue dated May 11, A. D. 1889, and that the last publication of said notice was in the issue dated June 8, A. D. 1889.

In witness whereof I have hereunto set my hand this 8th day of June, A. D. 1889.

H. M. RHOADS.

Subscribed and sworn to before me, James M. Lomery, a notary public, this 8th day of June, A. D. 1889.

[SEAL.]

JAMES M. LOMERY, *Notary Public.*

And afterwards, upon, to wit, the 29th day of July, A. D. 1889, the following affidavit was filed in said court, to wit:

STATE OF COLORADO, ARAPAHOE COUNTY, ss.:

In the County Court.

CHARLES H. COOPER, PLAINTIFF, v. EMOLINE M. COOPER, DEFENDANT.

Thomas W. Lipscomb, of lawful age, being duly sworn, on oath says he is the attorney of record for the plaintiff in the above-entitled cause; that no answer, demurrer, or copy of answer, demurrer, or other plea has been served on him by the defendant or any one for her, nor any notice of appearance.

THOS. W. LIPSCOMB.

Subscribed and sworn to before me this 29th day of July, A. D. 1889.

WM. R. PERRY, *Clerk*.

And thereupon the following order was had and entered of record in said court, to wit:

CHARLES H. COOPER v. EMOLINE M. COOPER. DIVORCE. 11223.

In this action the defendant having been regularly served with process and having failed to appear in answer to the complaint of the plaintiff filed herein, the legal time for answering the same having expired, and it appearing to the satisfaction of the court that no answer, demurrer, motion, or notice of appearance has been filed by said defendant, upon motion of Thomas W. Lipscomb, esq., attorney for said plaintiff, the default of said defendant is hereby entered according to law.

And thereupon the following order was had and entered of record in said court, to wit:

CHARLES H. COOPER v. EMOLINE M. COOPER. DIVORCE. 11223.

This cause having been brought on to be heard the 29th day of July, 1889, before the court, upon the complaint of the plaintiff above named, taken pro confesso, and upon the proofs taken in said action, default having been first entered against the defendant for failure to appear or plead to the plaintiff's complaint, and it appearing to the court that all the material averments of the complaint are sustained by testimony free from all legal exceptions as to its competency, admissibility, and sufficiency, and that the matters so alleged and proved in behalf of the plaintiff are sufficient in law to entitle the plaintiff to the relief prayed for in his complaint, on motion of Thomas W. Lipscomb, esq., counsel for plaintiff, it is ordered, adjudged, and decreed by the court that the marriage between the plaintiff, Charles H. Cooper, and the said defendant, Emoline M. Cooper, be dissolved and the same is hereby dissolved accordingly, and the said parties are and each of them is freed and absolutely released from the bonds of matrimony and all the obligations thereof.

GEO. W. MILLER, *County Judge*.

I, William R. Perry, clerk of the county court of Arapahoe County, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete copy of all orders and papers had and entered of record in a certain cause past pending in said court, on the civil side thereof, wherein Charles H. Cooper was plaintiff and Emoline M. Cooper defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Denver, this 18th day of October, A. D. 1889.

[SEAL.]

WM. R. PERRY, *Clerk*.

K. P. MACE, *Deputy*.

Sometime after the granting of this divorce the soldier married the claimant Sophie M. Cooper in Colorado, and they maintained marital relations up to the soldier's death, which occurred June 16, 1894.

The attorneys of Emma M. Cooper have submitted a brief in which they take

exception to the allegation of the fact and place of the soldier's marriage set up in his bill of complaint, error in name of defendant, jurisdiction, and faulty statutory publication, and cite attention to several departmental decisions in support of their contention that the soldier's divorce from their client was obtained by fraud and misrepresentation, and is null and void *ab initio*.

It would appear from the claimant Emma M. Cooper's affidavit that she was rather familiar with all the circumstances incident to the soldier's divorce proceedings, notwithstanding the fact that she disclaims having been served with notice by publication or otherwise.

After a careful consideration of the facts, the evidence, the exceptions and arguments of claimant Emma M. Cooper's attorneys, a good *ex parte* case would appear to be made, and would evidently enable her to have said divorce readily annulled and set aside, but I am clearly of the opinion that this Bureau is not warranted in questioning the validity of a decree of divorce upon *ex parte* evidence alone, and therefore hold that this Bureau is bound by said decree, and that claimant Emma M. Cooper can not be considered the legal widow of the soldier.

The pensionable status of the claimant in this case, it appears, depends upon the nature and character of the decree of divorce obtained by her husband in the State of Colorado while she was a resident of the State of Massachusetts.

Where a statute in derogation of common law prescribes a method of perfecting service upon a defendant who resides in another State, the statutory provisions must be strictly observed and the record must affirmatively show all jurisdictional facts.

In the case of *O'Rear v. Lazarus* (8th Colo., 608) it is held:

There is stated in the affidavit upon which the order for publication rests sufficient information concerning the actual place of abode of the nonresident defendant to require that a copy of the summons should have been mailed to him. The materiality of this statutory requirement is not questioned. The judgments of courts having superior and general jurisdiction are presumed to be correctly entered, unless the contrary appears. This presumption includes jurisdiction over the parties as well as the subject-matter. But when the judgment is against a nonresident defendant and there is no personal service, reliance being placed wholly upon service by publication, an exception to the foregoing principle exists. The rule in such case seems to be that the record must affirmatively show all the essential jurisdictional facts. This rule is not entirely undisputed, but it is sanctioned by the weight of authority and, in our judgment, is founded upon excellent reason. It is said that "the presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, and also over proceedings which are in accordance with the course of the common law."

Constructive service of process obtained by publication is, as already suggested, not "in accordance with the course of the common law;" it is also, in most cases, dependent upon the fact that the party to be summoned is beyond the territorial limits of the court's jurisdiction. It follows, therefore, that the record in this case should have affirmatively shown a compliance with the statutory provision relating to forwarding the process by mail. This it fails to do, and the omission is fatal to the jurisdiction of the court below. Again, the record shows that the service of summons was not complete until the 15th of November. It also appears therefrom that the default was entered on the 16th and the judgment rendered on the 19th of the same month. But, by statute, defendant was allowed forty days after the completion of service in which to appear and plead. Therefore both the default and the judgment were unauthorized and premature.

By an inspection of the transcript of the divorce proceedings it will be discovered that the same does not affirmatively show that a copy of the summons was mailed to the defendant, although her post-office address was known. This omission or defect in the record is fatal to the jurisdiction of the court which rendered the judgment or decree of divorce. The requirement of the statute, to the effect that notice should be mailed to a nonresident defendant whose post-office address is known, is really the most wholesome and salutary provision therein contained, for the reason that such defendant is by such a method most likely to receive real, instead of constructive, notice of the proceedings against him.

The action of rejection is reversed, with instructions that the case be readjudicated in accordance with this opinion.

MARRIAGE OF SLAVES IN KENTUCKY—ACT JUNE 27, 1890.

MARY RIDDLE (WIDOW).

This appellant and the deceased soldier were colored persons residing in the State of Kentucky, and had been married while in a state of slavery in the year 1852, in accordance with the custom of slaves, but after their emancipation had taken no steps to ratify and legalize their subsisting slave marriage in the manner required by the statutes of that State.

Held, That the appellant can not be recognized as the widow of the soldier and is not entitled to pension as such under the provisions of the third section of the act of June 27, 1890. See decisions in cases of Nannie Roach (7 P. D., 80); and Lettie Hawkins (8 P. D., 22).

First Assistant Secretary Thomas Ryan to the Commissioner of Pensions, March 10, 1900.

Mary Riddle filed in the Pension Bureau on October 9, 1897, an application for pension under the provisions of the third section of the act of June 27, 1890, as widow of McCollister Riddle (deceased), late private, Company I, One hundred and twenty-third United States Colored Volunteer Infantry, alleging the death of said soldier on September 21, 1897, leaving her without other means of support than her daily labor.

Said application was rejected on May 13, 1898, upon the ground that the claimant was not the widow of the deceased soldier, and not entitled to pension as such under the provisions of said section.

From said action appeal was taken on June 27, 1898.

The deceased soldier and the appellant were colored persons, who resided in the State of Kentucky, and prior to the civil war were slaves. It is admitted in this case that the soldier and appellant were married in 1852, while in a state of slavery, according to the custom of slaves, and that they continued to live together as man and wife in Kentucky after their emancipation up to the time of the soldier's death, which is shown to have occurred upon the date alleged. It is also admitted that

they took no steps after they were emancipated to ratify or legalize their subsisting slave marriage in the manner required by the laws of the State of Kentucky, but continued to live together as they had previously done under their slave marriage.

The provisions of section 4705, Revised Statutes, by their express terms relate exclusively to the proof of marriage required of the widows of such colored and Indian soldiers as have died from wounds, injury, or disease incurred or contracted in the service and line of duty, and have no application to the claims of widows for pension under the third section of the act of June 27, 1890.

The marriages of all persons, both white and colored alike, applying for widow's pension under the provisions of this latter section must be proved in accordance with the provisions of the second section of the act of August 7, 1882, which provides:

That marriages, except such as are mentioned in section 4705, Revised Statutes, shall be proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time of marriage, or at the time when the right to pension accrued.

This appellant and the deceased soldier resided during the whole of their married life in the State of Kentucky, and resided in that State at the time of the soldier's death, when, if at all, this appellant's right to pension accrued. During the time that they were slaves they could not contract a valid and legal marriage in that State, and the statute of Kentucky of February 14, 1866, provided that in order to ratify and legalize subsisting slave marriages after emancipation they should appear before the clerk of the county court of their then residence and declare that they have been and desire to continue living together as husband and wife, and a record should be made of such declaration, and a certificate thereof issued to the parties making the same. Upon failure to comply with the requirements of this statute it was decided by the supreme court of Kentucky (*Estill v. Rogers*, 1 Bush., 62) that a slave marriage, such as existed between the appellant and the deceased soldier, was absolutely void and of no legal force or effect in that State.

It is manifest, therefore, that under the provisions of the second section of the act of August 7, 1882, which control in this case, this appellant can not be recognized as the widow of the soldier for pensionable purposes under the third section of the act of June 27, 1890, and is not entitled to pension as such widow thereunder. See decisions of this Department in the cases of *Nannie Roach* (7 P. D., 80) and *Lettie Hawkins* (8 P. D., 22).

The appellant filed in this case a certificate, dated Louisville, Ky., March 22, 1865, and signed by James J. Brisbin, brevet brigadier-general and superintendent organization United States troops, which recites that McCollister Riddle is a soldier in the One hundred and twenty-third United States Colored Infantry, and according to the provisions

of an act of Congress, passed on the 3d day of March, 1865, freeing the wives and children of colored soldiers, it is declared that Mary Riddle, wife of McCollister Riddle, and his children are free, and will be treated accordingly.

It is contended by the attorney for the appellant that this certificate was an official recognition by the Government of the United States of this appellant as the lawful wife of the deceased soldier, and therefore she should be accepted as his widow for pensionable purposes, notwithstanding the laws of Kentucky and the provisions of the second section of the act of August 7, 1882.

This contention is wholly untenable. The act of Congress, in pursuance of which said certificate was issued, did not nor did it undertake to legalize and validate the existing slave marriages of colored soldiers, but simply recognized such relations for the purpose of freeing from the bonds of slavery the wives of such soldiers and the issue of such marriages, and for no other purpose whatever. Said act of Congress and the certificate of freedom issued thereunder to this appellant had no effect whatever upon the legal status of this appellant as the wife of the soldier under the laws of the State of Kentucky, nor could it have had, and it is under the requirements of the laws of Kentucky that her marriage to the soldier must be proven to have been a legal marriage by the express and positive provisions of the second section of the act of August 7, 1882.

It is therefore clear that the rejection of this claim upon the ground stated was not error, and said action is affirmed accordingly.

RATE—FIRST GRADE—COMMENCEMENT—ACT MARCH 4, 1890.

JAMES BENNETT.

Unless a pensioner's name was borne upon the rolls at first-grade rate proper—\$50 per month—prior to the passage of the act of March 4, 1890, which act increased the said rate to \$72 per month, or the certificate of a medical examination made prior to the passage of the said act showed the existence of such a degree of disability as to warrant the allowance of the said first-grade rate, the terms of the act itself prohibit the allowance of the rate prescribed therein from any period prior to the date of the certificate of an examining surgeon or board of examining surgeons showing such degree of disability.

First Assistant Secretary Thomas Ryan to the Commissioner of Pensions, March 23, 1900.

The question at issue in the pending appeal, filed May, 1898, in the case of James Bennett, late sergeant, Company L, Second New York Cavalry, has once before been considered and, to a certain extent, decided by the Department.

The appellant is now pensioned at \$72 per month for gunshot wound of right eye, injuring sight of left; and gunshot wound of left shoulder.

The said rate was allowed May 21, 1892, to commence April 1, 1891, the date of the first medical examination held subsequent to the passage of the act of March 4, 1890, which examination was held in pursuance of an application for increase filed March 6, 1890.

The former appeal was taken from the action of the Bureau declining to allow the said rate from the date of the passage of the act creating the same, instead of from the date of the aforesaid medical examination. The said action was set aside by the Department, and the papers in the case were remanded to the Bureau for the purpose of having a thorough special examination held in the premises with a view to affording the appellant an opportunity to show whether or not, as a matter of fact, he was totally and permanently helpless at, and for some time prior to, the date of the passage of the act of March 4, 1890, by reason of the causes of disability for which he is, and was then, pensioned, and therefore entitled to the \$72 rate from the date of the passage of the said act, as contended in his said appeal.

The requirements of the Department were duly complied with, but the evidence adduced upon special examination failed to convince the Bureau that any change in the rates formerly allowed was warranted.

The present contention of the appellant is to the effect that the said evidence shows that his condition was such at and prior to March 4, 1890, as to warrant the allowance of the \$72 rate from said date instead of from April 1, 1891.

After due consideration of the said new evidence it would seem as though the degree of disability due to the aforesaid pensioned causes was practically the same on March 4, 1890, the date of the act to the benefits of which the appellant lays claim, that it was on April 1, 1891; but after more mature deliberation and thorough reconsideration of all the questions involved in the contentions now and heretofore at issue in this case, the Department feels impelled to hold that the terms of the aforesaid act itself preclude the allowance of the \$72 rate—in the case at bar—prior to April 1, 1891, the date of the first medical examination held subsequent to the passage of the said act. And it is, therefore, frankly acknowledged that former departmental decision in the premises was, in the light of the present view of the case, rendered more in accordance with the seeming equities of the appellant's contentions than under a full apprehension of certain material facts, the full weight of which was apparently not then appreciated.

The act of March 4, 1890, provides:

That all soldiers, sailors, and marines who have since the sixteenth day of June, eighteen hundred and eighty, or who may hereafter, become so totally and permanently helpless from injuries received or disease contracted in the service and line of duty as to require the regular personal aid and attendance of another person, or who, if otherwise entitled, were excluded from the provisions of "An act to increase certain pensioned soldiers and sailors who are utterly helpless from injuries received or disease contracted while in the United States service," approved June sixteenth, eighteen hundred and eighty, shall receive a pension at the rate of seventy two

dollars per month from the date of the passage of this act or of the certificate of the examining surgeon or board of surgeons showing such degree of disability made subsequent to the passage of this act.

The act of June 16, 1880, referred to in the above-quoted act of March 4, 1890, provided, among other things, that soldiers then receiving a pension of \$50 per month, under the provisions of the act of June 18, 1874, should receive in lieu of all pensions then paid them a pension of \$72 per month; and the act of June 18, 1874, provided, in turn, among other things, that a pension of \$50 per month, in lieu of a pension of \$31.25 per month (provided by section 4, act of March 3, 1873), should be paid to such persons as had been granted the latter sum for certain disabilities, enumerated in the said act, by reason of which the regular aid and attendance of another person was required; and, also, for "any other injury resulting in total and permanent helplessness." It was provided in the said act, however, that the said increase in pension should not be granted by reason of any of the injuries specified therein unless the same should have resulted in permanent total helplessness, requiring the regular aid and attendance of another person.

This appellant was granted an increase of pension from \$24 to \$31.25 per month, the latter rate to commence November 7, 1877, the date of a medical examination held in the case in pursuance of a claim for increase filed October 12, 1877. Several subsequent applications for increase were duly rejected, and it was not until 1882 that the claimant was able to secure an increase in rate; but the said increase was granted by a special act of Congress, and not under the provisions of the general law. The said special act increased the rate in the case to \$50 per month from August 5, 1882, the date of the passage of the act.

It will be seen, therefore, that the appellant never established any title to the benefit of the provisions of the acts of June 18, 1874, and June 16, 1880, respectively, and consequently have been entitled to the full benefit of the provisions of the act of March 4, 1890.

In a slip bearing date of April 12, 1892, the chief of the board of review, of the Bureau, expressed the following opinion:

A reissue to allow pension under the general law can be made in this case. If medical examinations show first-grade rating prior to March 4, 1890, the increase of \$72 per month must commence from March 4, 1890; if subsequent to the date named, increase commences from date of examination showing same.

The last medical examination in the case prior to March 4, 1890, was held March 24, 1882, at Auburn, Ill., the certificate of which states, among other things, after describing the soldier's several disabilities, that—

Opthalmoscopic examination of the eye (left) shows that he has about one-fifth normal vision. * * * There is no reason to suppose that the claimant for increase is not able to take care of himself. The case is pitiable in the highest degree, and it should seem that his extraordinary history should entitle him to a higher rating than is practicable under the general law.

The soldier was, unfortunately, not again examined, either by an examining surgeon or board of examining surgeons during the period intervening between the aforesaid medical examination of March 24, 1882, and the date of the passage of the act of March 4, 1890, a period of eight years. There is, therefore, no certificate of a medical examination on file tending to show a first-grade rating except the certificates of the two medical examinations held subsequent to the passage of the said act. The reason he was not examined during the said time is probably due to the fact that inasmuch as a first-grade rate was but \$50 per month—the same rate at which he was then pensioned under a special act of Congress—no apparent benefit would have been conferred by having his name transferred to the rolls under the general law, as it could not, of course, be foreseen that the first-grade rate would be so amended—as it was by the act of March 4, 1890—as to increase it to \$72 per month.

It seems quite clear, therefore, that inasmuch as this appellant had not established his title to a first-grade rate prior to the passage of the act of March 4, 1890, that the terms of the act itself will not admit of the allowance of the rate prescribed therein from any period prior to the date of the certificate of the examining surgeon or board of examining surgeons showing such degree of disability as would warrant the allowance of the said rate.

The circumstances surrounding this case are such as to excite much sympathy and to warrant every possible consideration and leniency being extended, but the Department, nevertheless, feels constrained to hold that the action appealed from is not shown to have been error; the same is, therefore, hereby affirmed, and the papers in the case are remanded herewith.

MARRIAGE—IMPEDIMENT—EVIDENCE.

LIZZIE YATES (WIDOW).

The mere fact that Yates was a "widower" when he married claimant is assumed by the Bureau of Pensions to be sufficient ground on which to compel claimant to furnish positive evidence of the death or divorce of the former wife.

Held, Claimant having shown a ceremonial marriage, and there not being the shadow of a suspicion (beyond the fact that the officer was a widower) that claimant's marriage was not a lawful one, the burden of proof is upon the Government to show the illegality of such marriage. (Stewart on M. and D., Chap. XVIII.)

First Assistant Secretary Thomas Ryan to the Commissioner of Pensions, March 23, 1900.

Lizzie, as widow of Charles H. Yates, formerly a first lieutenant in Company H, Ninety-sixth Illinois Volunteer Infantry, filed her application under the act of June 27, 1890, on September 10, 1897, claim being rejected on June 15, 1898, on the ground that claimant has not

shown herself to be the widow of the officer in question. An appeal filed on July 9, 1898, contends that rejection is contrary to the law and evidence.

Claimant asserts that she was married to soldier on July 7, 1883, at St. Marys, Ontario, by Rev. W. A. Wilson. In proof of such facts she has filed a transcript of the records of the registrar-general's office in Toronto, Canada, which is in full accord with her statements. Said record shows that the bridegroom was 40 years of age at the time, and that he was a widower.

Claimant states that her husband told her he was a widower and that his former wife had been dead about twenty years. Two witnesses who knew soldier for some little time prior to his marriage with claimant state that although they never knew the former wife they had always understood that she was dead, one of these affiants stating her understanding to be that the former wife had been dead for "many years." Soldier became a minister after his marriage with claimant, and died in such profession. The above are all of the facts in the case.

The rule requiring the claimant to show the death or divorce of a former wife is undoubtedly a sound one. It is not, however, an inflexible one, and is not to be exercised in such a rigorous manner as to cut off the legal rights of a claimant. Whenever any circumstances in a case point to any reasonable inference that the marriage of a claimant was not a valid one, she should be put upon positive proof that her marriage was valid and lawful. When, however, there is an utter absence of any indication that the marriage of a claimant was not a legal one, the severity of the rule should be relaxed, and the usual presumption of law as to the validity of a ceremonial marriage should be allowed to prevail, and the burden of proof shift to the one who denies its validity.

In the case at bar it is shown that the officer said he was a widower and that the record shows him to have been such at the date of his marriage with claimant. He could not be a widower if his former wife was living and undivorced, and there is not the shadow of a suspicion raised by the evidence that he did not have a full and complete legal right to marry claimant when he did.

Claimant states that it is impossible for her to prove the death of the first wife, and I can discover no good reason why claimant should be put to proof positive upon this point. On the contrary she has done all the law requires to be done under the circumstances, and if the Government proposes to join issue as to the death or divorce of the former wife it is for the Government to establish that fact. The burden of proof rests upon the Government in this instance, and they have introduced no evidence whatever upon the issue.

The mere fact that this officer was a "widower" when he married claimant does not raise the slightest presumption that his status was such that he could not legally marry claimant. On the contrary, it

does raise a presumption to the directly opposite effect. (Stewart on Marriage and Divorce, Chapter XVIII.)

Under the evidence it is held that claimant is the widow of Charles H. Yates, formerly first lieutenant in Company H, Ninety-sixth Illinois Volunteer Infantry.

The action appealed from is reversed.

EVIDENCE—PRIOR SOUNDNESS—REIMBURSEMENT.

CHARLES HEBEL.

The record of treatment of this pensioner for diarrhea on one occasion during his first term of service as a private in Company G, Sixth Ohio Volunteer Infantry, in the absence of any evidence whatever of the existence or continuance of said disease during the remainder of his service in said organization, at the date of his discharge therefrom, during the period of two years that intervened between said service and his second enlistment and muster in as an officer of Company K, One hundred and eighty-sixth Ohio Volunteer Infantry, or at the date of his second enlistment, is not alone sufficient to overcome presumption of soundness at the date of said second enlistment, or to warrant or justify the action reducing the pension for chronic diarrhea that had been allowed him from date of discharge from his second term of service as of the rank of captain, to the rank and rate of a private, and said action was erroneous.

It necessarily follows that the action withholding payment of the pension at present allowed to reimburse the Government for excess of payments made to the pensioner as of the rank of captain was likewise error.

*First Assistant Secretary Thomas Ryan to the Commissioner of Pensions,
March 29, 1900.*

Charles Hebel, late private, Company G, Sixth Ohio Volunteer Infantry, and Captain Company K, One Hundred and Eighty-sixth Ohio Volunteer Infantry, was originally pensioned under the provisions of the general pension law for chronic diarrhea from September 18, 1865, the date of his discharge from his term of service in Company K, One hundred and eighty-sixth Ohio Volunteer Infantry, as of the rank and at the rates of pension provided for a captain in the Army of the United States.

On May 23, 1898, his pension certificate was, after due and legal notice, reissued to reduce his pension for chronic diarrhea from the rating of a captain to the rates provided by law for a private, upon the ground that it was shown by the official record of his military service that said disease had originated, and he had been treated therefor during his first term of military service, while serving as a private in Company G, Sixth Ohio Volunteer Infantry, and said pension as private was made to commence from February 14, 1863, the date of his discharge from his term of service in Company G, Sixth Ohio Volunteer Infantry, deducting the period of his subsequent service in Company K, One hundred and eighty-sixth Ohio Volunteer Infantry, and payment of

said pension was withheld and is still being withheld from said pensioner to reimburse the Government for the excess of pension erroneously paid him as of the rank of captain.

From the action reducing his rate of pension and withholding payment of the same, as aforesaid, this appeal was taken by the pensioner on July 22, 1898.

This appellant has also been allowed additional pension on account of disease of lungs, but as said disease was alleged and proved to have originated during his first service, while serving as a private in Company G, Sixth Ohio Volunteer Infantry, it is not involved in the issue presented by this appeal and need not be considered in connection therewith.

The official record of the appellant's military service shows that he first enlisted as a private in Company G, Sixth Ohio Volunteer Infantry, and served therein as of that rank from January 6, 1861, to February 14, 1863, when he was discharged upon a surgeon's certificate of disability, because of disease of lungs. He was again enrolled and mustered into the military service on January 3, 1865, as second lieutenant of Company K, One hundred and eighty-sixth Ohio Volunteer Infantry, and served therein as of that rank until March 1, 1865, when he was mustered in as captain of said company, and served as such until September 18, 1865, when he was mustered out of the service and discharged with his company. In his original application for pension the appellant alleged chronic diarrhea as having been contracted in line of duty during his second term of service as captain of Company K, One hundred and eighty-sixth Ohio Volunteer Infantry, about May or June, 1865, and the origin of said disabling cause at the time and place alleged, the circumstances under which it was contracted, and the continuance of said disease thereafter were clearly and fully established by the testimony of the assistant surgeon and colonel of said regiment, and other reliable witnesses, both medical and lay.

This evidence was deemed sufficient, on the adjudication of the claim by the Pension Bureau, to establish the service origin of chronic diarrhea, as alleged, and continuance of a pensionable disability therefrom; the claim was admitted, and a pension allowed for said disability, at the rating provided by law for the rank of captain, from September 18, 1865, the date of the appellant's final discharge from the military service.

In 1893 the appellant filed an application for additional pension based on disease of lungs, alleged to have been contracted in 1862, during his first term of service as a private in Company G, Sixth Ohio Volunteer Infantry, and in the course of the adjudication of this claim an additional report relative to the record of his service in that organization was called for from the War Department. This report, which was dated March 6, 1897, recited the fact that the medical records contained the statement that the appellant had received medical treatment on two occasions during his service as a private in

Company G, Sixth Ohio Volunteer Infantry; once on February 20, 1862, for "constipation," and once on April 30, 1862, for "diarrhea."

This record of treatment on one occasion for "diarrhea," not chronic diarrhea, during the appellant's first service is the sole and only basis existing in this case for the action, hereinbefore stated, from which this appeal is taken.

There is not a particle of evidence on file tending to show that the appellant ever had diarrhea at any other time during his first service than the one occasion mentioned in the record, and there is no evidence that he ever had chronic diarrhea at any time prior to some time in May or June, 1865, when he was serving as captain of Company K, One hundred and eighty-sixth Ohio Volunteer Infantry. A period of about three years elapsed between the date upon which the record shows he was treated once for "diarrhea" in his first service and the date when he is shown by testimony, which has been accepted as sufficient proof by the Pension Bureau, to have contracted chronic diarrhea in his second service, during which period there is not one word of testimony or evidence of any kind or nature whatever showing or even tending remotely to show the existence of diarrhea, at any time, or in any degree, or of any character.

The official record of the appellant's military service in Company G, Sixth Ohio Volunteer Infantry, shows clearly on its face that the "diarrhea" for which he was treated on April 30, 1862, was but an ordinary acute attack of diarrhea, not serious in character, of short duration, and not permanent in its effects.

In the first place, said record does not state, as was erroneously stated in the notice of March 30, 1898, to the appellant of the proposed action reducing his rate of pension, that he had "received hospital treatment for chronic diarrhea" while serving in Company G, Sixth Ohio Volunteer Infantry, nor could any such meaning be fairly deduced from said record; but it simply shows that he received treatment on one occasion, April 30, 1862, for "diarrhea." It does not state nor indicate in any manner that the appellant was sent to or treated in a hospital, regimental or general, on this occasion, but simply that he received medical treatment on that day, and on that day alone, for an attack of ordinary diarrhea, not chronic diarrhea, presumably, in the absence of anything to the contrary appearing, in the regiment and in his quarters. The only just and fair inference that can be drawn from said record is that this appellant appeared at sick call on said date and was prescribed for by the regimental surgeon for an acute attack of diarrhea, and this is all there is in it. Furthermore, the record shows that said attack of diarrhea could not have been either of long duration, or serious, or disabling in character, or permanent in its effects, for the rolls show that he was present for duty from the date of his enlistment in 1861 to November 22, 1862, when he was left sick at Nashville, Tenn., with disease of lungs, and was never afterwards

treated during said service for diarrhea, or any other form of bowel trouble, consequently said attack of diarrhea on April 30, 1862, could not have been of sufficient importance or gravity to have excused appellant from duty, even on that day, or at any time afterwards during said service. The appellant was discharged from his term of service in Company G, Sixth Ohio Volunteer Infantry, on February 14, 1863, upon a surgeon's certificate of disability, wherein it is recited by the captain of said company that he had served as regimental and brigade bugler from July, 1861, to October 25, 1862, since which date he had been rendered unfit for any duty by a pulmonary disease; and the assistant surgeon in charge of the regiment at the time certifies therein that he had carefully examined the appellant and found him "incapable of performing the duties of a soldier because of extensive adhesions of lungs and organized deposits within thoracic cavity. There is also evidence of tuberculous deposits within lungs."

There is not one word in this certificate indicating that this appellant then was or ever had been previously disabled by chronic diarrhea, and the presumption of law is that said certificate contained a description of all disabling causes present at the time of his discharge. This presumption has been frequently announced in the decisions of this Department, and has been uniformly applied and acted upon by the Pension Bureau in the adjudication of pension claims where it operated adversely to the claimant, and there is certainly no reason why it should not apply with equal force in this instance where it would operate to the advantage of this appellant.

The appellant swears positively that he never had chronic diarrhea while serving in Company G, Sixth Ohio Volunteer Infantry, that he never was treated for said disease and was never in hospital while in that regiment, and the official record appears to fully support and corroborate him in these statements. Nor are said statements to be considered in conflict with the record of treatment for diarrhea on April 30, 1862, since it is not to be reasonably expected that any man could remember every acute attack of diarrhea of not more than a day's duration that he had had in all his life. The record of the appellant's first service fully justifies the inference that the attack of diarrhea for which he was treated on April 30, 1862, was so slight and of so little importance that it failed to impress itself upon his memory.

It has been frequently held by this Department that a second enlistment raises the presumption that if any disability had been contracted in the first service, the claimant had recovered therefrom and was sound at the date of the second enlistment, and this presumption will stand until clearly disproved. See cases of John T. Taylor (1 P. D., 281); George W. Gemberling (*ibid.*, 213); John C. Brown (*ibid.*, 321); William Bonner (*ibid.*, 346); Wesley W. Taylor (*ibid.*, 359); John H. McLaughlin (2 P. D., 85); David G. Runnel (*ibid.*, 91); Fritz Mueller (*ibid.*, 192); Everett Caward (*ibid.*, 297).

The ruling announced in the above-cited decisions has been uniformly applied by this Department and the Pension Bureau in the adjudication of pension claims, where the same are based upon a disability alleged to have originated during a first term of military service, and claimants have been required to overcome and rebut the presumption of recovery and soundness at the date of the second enlistment by positive, direct, and circumstantial proof of the existence and continuance of the alleged disability during such interval as may have intervened between the two terms of service, at the date of the second enlistment and during the period of the second service, in order to establish their claims.

In this case more than two and one-half years intervened between the discharge of the appellant from his first service and the date of his second enlistment, during which time there is not a scintilla of evidence tending to show the existence of diarrhea in any form, or that it existed at the date of his enrollment in his second service, or during said service prior to the date at which the evidence shows he contracted the chronic diarrhea for which pension was originally allowed him. Not only so, but the medical evidence filed in support of the appellant's original claim distinctly states that he was free from chronic diarrhea prior to his second service. Consequently, no good reason can possibly be assigned why the above-mentioned presumption of recovery and soundness at the date of appellant's second enlistment would not arise in this case, when it operates in favor of his present contention, with just as much force and effect as if he had alleged the origin of chronic diarrhea during his first service. In the latter case he would unquestionably have been required to prove by direct and positive evidence the continuance of the disability alleged from and after the date of his discharge from his first service, and it necessarily follows that when it is asserted by the Pension Bureau as the basis of its action in this case that the disability originated in his first service, the same proof would be required to overcome the presumption of recovery and soundness arising from his second enlistment. Said presumption would undoubtedly be just as strong and just as effective in the one case as in the other, and it makes no difference that in this instance it happens to support and confirm the contention of the appellant.

In view of the foregoing I am clearly of the opinion that no connection whatever has been established in this case between the acute attack of diarrhea for which the record shows this appellant was treated on April 30, 1862, during his first service, and the chronic diarrhea which the evidence shows he contracted while serving as captain during his second service, and for which he was pensioned, and the action reducing this appellant's rating for chronic diarrhea from that of a captain to that of a private was wholly unwarranted by the evidence in this case.

The foregoing conclusion necessarily carries with it the question of

reimbursement, so that it is unnecessary to discuss the question raised by the appeal as to the right to withhold any part of the pension at present allowed the appellant to cover the excess of pension alleged to have been erroneously paid to him.

The action of May 23, 1898, reissuing this appellant's certificate, and rerating him from date of his discharge from his first service for chronic diarrhea as of the rank of a private is, therefore, hereby reversed and set aside, and you are requested to cause another reissue of the appellant's certificate to be made restoring his pension for chronic diarrhea as of the rank of captain from the date of his discharge from his second term of service, deducting all intermediate payments.

DEATH CAUSE—EVIDENCE—LAY TESTIMONY.

MARIA HARMS (WIDOW).

Lay testimony, the only evidence adduced in the case at bar relative to the alleged origin and continuance of disease of kidneys, is utterly inadequate to show the existence at any time of any morbid condition of said organs, especially when a chemical analysis and microscopical examination of the soldier's urine made but two months prior to his death showed conclusively that he had no organic disease of kidneys.

*First Assistant Secretary Thomas Ryan to the Commissioner of Pensions,
March 29, 1900.*

The pending appeal in the cases of Hinrich Harms, deceased, formerly private, Company K, Eighth Missouri State Militia Cavalry, and of Maria, widow of decedent, respectively, was filed July 5, 1899.

The appeal in the invalid claim was taken from Bureau action of March 20, 1899, rejecting the soldier's claim for additional pension on account of rheumatism and disease of kidneys, alleged to have been of service origin; and the appeal in the widow's claim was taken partly on the same grounds, namely, the refusal of the Bureau to admit the claim on account of disease of kidneys, the alleged cause of the soldier's death, as proven to have been of service origin.

The soldier's said claim for additional pension was filed March 3, 1892, and was both legally and medically rejected a few months thereafter on the ground that its allowance would "confer no additional benefit—claim having been allowed under the act of June 27, 1890." The said claim was, however, subsequently reopened and readjudicated. The second adjudication of the claim was also adverse, the action spread upon the brief face March 20, 1899, being as follows:

Reject alleged rheumatism and disease of kidneys; no record, and, after special examination, no other satisfactory evidence which proves soldier contracted said causes of disability during or because of his military service.

The widow's said claim was rejected March 28, 1898, on the ground that the soldier's "death resulted from disease of urinary organs, alco-

holism and senile debility, not due to cause which has been legally accepted," namely, "injury to left testicle," the only disability established as of service origin.

It is contended, in part, in the pending appeal by the attorney for the appellant, that—

The origin in service and line of duty of rheumatism and disease of kidneys is shown by the testimony of Comrades Heinrich Michaelis, Heinrich Hashagan, and John E. Feldman.

The continuance of rheumatism and disease of kidneys in a pensionable degree, at and from the date of his return from the army to the date of his death, and that Harms died of disease of the kidneys, is shown by the testimony of witnesses Lutjen, Michaelis, Rostel, and Dr. A. R. Keiffer.

It is also contended by the attorney in the case that, although the evidence on file does show that the soldier was in the habit of getting drunk, both before the war and after his discharge from the army, which fact, it is admitted, might occasion some speculation respecting pathological and physiological results, there is, nevertheless, the more potent evidence of comrades, other witnesses, and of the attending physician which seems sufficient * * * to make imperative the resolution of any doubt of the character suggested in favor of the appellant.

As to the alleged rheumatism, the only evidence adduced tending to show its origin in the service and continuance since discharge is the testimony of several comrades of the soldier, who state that shortly before his discharge he complained of pain in his back, which, they think, was rheumatism, and of several neighbors, who testify to his complaining of similar pains subsequent to his discharge.

An equal number of comrades and neighbors testified before a special examiner of the Bureau that they never knew or heard of the soldier having rheumatism.

It is worthy of note that the soldier never applied for a pension on account of rheumatism until 1892, twenty-seven years after his discharge from the service, although his declaration for pension on account of injury of left testicle was filed January 2, 1880. The certificate of the medical examination of the claimant made March 16, 1892, the last examination held in the case, shows that he probably had some rheumatism at that time, as the findings of the examining surgeons was to the effect that some enlargement, and limitation of motion, of the left shoulder and of both knees then existed, which, they thought, was due to rheumatism; but in no one of the certificates of the three prior medical examinations held in the case was there any suggestion of the existence of rheumatism. If the objective conditions found at the said last medical examination were due to rheumatism, the said disease was probably of recent origin, and it was not until its development just prior to his death that the soldier sought to connect any such disability with his military service.

As to the alleged "pain in his back," testified to by the aforesaid

comrades and neighbors, it may readily be accounted for by the fact that the soldier had incurred a severe injury of his left testicle prior to the advent of the said pain in his back, which injury caused certain pathological conditions of the said organ, which persisted during the balance of his life, on account of which he was pensioned. and which may have been and probably was responsible for the pain which many years afterwards was diagnosticated by several laymen as rheumatism. The herniæ, also, which came on subsequent to the soldier's discharge from the service, could have been responsible in a large measure for the pain in back complained of subsequent to the soldier's discharge from the service.

The evidence adduced in regard to the alleged rheumatism is therefore utterly inadequate to show that the soldier contracted any such disability in the service or suffered therefrom at the date of his discharge or at any time thereafter prior to the year in which he died.

And the evidence adduced relative to the origin and continuance of the alleged disease of kidneys is still more insufficient—in fact, it is utterly inadequate to establish the existence of any pathological condition of those organs at any time prior to the date covered by the testimony of Dr. Keiffer, as the testimony upon which it is sought to show that the soldier contracted said disease while in the service, and continued to suffer therefrom ever afterwards, up to the date of his death, is, with the exception of the said testimony of Dr. Keiffer, that of three laymen, the same persons who testified in regard to the origin and continuance of rheumatism, one of whom signs his name by mark, and all of whom appear to base their alleged knowledge as to the existence, in the service and subsequent thereto, of disease of kidneys on the fact that the soldier had a pain in his back over the kidneys—the same subjective symptom upon which they also diagnosticated rheumatism. Disease of kidneys is, however, a condition the existence of which can not be established by any such testimony. Even a physician is not competent to testify to the existence in any given case of any morbid condition of the kidneys, *aut-mortem*, unless he has made a careful analysis, either chemical or microscopical, preferably both, of the urine of the person claiming to have some disease of those organs.

The only medical evidence on file or obtainable touching upon the alleged disease of kidneys is an affidavit of Dr. A. R. Keiffer, executed April 29, 1892, and a deposition of the said physician taken January 7, 1897, by a special examiner of the Bureau. The doctor stated in his said affidavit that he had been the soldier's family physician for over eight years, and further said—

* * * At present he is suffering from hæmaturia of severe type and several days' duration, and is in immediate danger of death. He may die any day.

In his deposition the doctor deposed and said, in part:

He was a man at one time that was a tough and rugged old fellow, but after I knew him he was broken in health. * * * He died in the spring of 1892. * * *

The cause of death was some trouble with his urinary apparatus. * * *

I remember he had blood in his urine (hæmaturia of kidneys). He had an attack of that trouble some months before that, and then during his last sickness had a recurrence. Now, whether that was the immediate cause of death or whether he had an attack of pneumonia with it, I am unable to remember. It seems to me sometimes that the old fellow had pneumonia, what we call intercurrent pneumonia setting in during the course of some other trouble, but I would not want to state it as a fact. * * *

Hæmaturia is a common disability among old people, so I have no idea what caused it. A man may have blood in his urine due to many complaints. I supposed in his case it was due to a granular kidney—that was my supposition.

I probably treated him for three weeks during his final sickness. * * *

I know he had blood in the urine, was prostrated, and at the last was delirious. * * *

I think the man was more or less rheumatic, but I don't know that I ever treated him for same. * * *

I never made any microscopical examination of the soldier's urine, but from his being an old man, and blood in his urine, I believe the cause of death was a granular kidney; at any rate, I presume that the death cause was the pathological condition upon which the hæmaturia depended.

I can't give any more facts in the case than I have.

Hæmaturia, or hematuria (blood in the urine), "may be due to injury, local disease, general disorder, or the presence of entozoa." (Gould).

The following division of the causes of hæmaturia is given by Osler:

(1) *General diseases*.—The malignant forms of the acute specific fevers, such as smallpox, malaria, yellow fever, etc., scurvy, purpura, and hæmophilia.

(2) *Renal causes*.—Acute congestion and inflammation, as in Bright's disease, or the effect of toxic agents, such as turpentine, carbolic acid, and cantharides. * * * Renal infarction, as in ulcerative endocarditis. New growths, in which the bleeding is profuse. * * * Stone in the kidney is a frequent cause. * * *

(3) *Affections of the urinary passages*.—Stone in the ureter, malignant diseases or ulceration of the bladder. The presence of a calculus, parasites, and, very rarely, ruptured veins in the bladder. * * *

(4) *Traumatism*.—Injuries may produce bleeding from any part of the urinary passages. * * *

The same author also speaks of "malarial hæmaturia which prevails in certain districts," and says that "it is important to distinguish between blood coming from the bladder and from the kidneys, though this is not always easy."

It does not appear from the testimony of Dr. Keiffer that he ever made a chemical analysis of the soldier's urine. He stated, however, in his aforesaid deposition, that he had not made a microscopical examination of the same, and it is altogether improbable that he examined it with the spectroscope. His diagnosis of hæmaturia was therefore, in all probability, based merely upon the color of the urine. And his theory that the hæmaturia was caused by a granular kidney was not only purely speculative on his part, but, as will soon be seen, was an error of diagnosis.

That the soldier did not have granular kidneys (chronic interstitial

nephritis; chronic Bright's disease) is clearly shown by the findings of the board of surgeons by which he was examined March 16, 1892, less than two months prior to his death.

The certificate of that examination states in part:

Disease of kidneys.—We find no disease present; no albumen, sugar, or casts in urine. Urine normal under the tests, both chemical and microscopic.

Inasmuch as Dr. Keiffer did not make an analysis of the soldier's urine with a view to confirming his aforesaid diagnosis, the findings of the said board of examining surgeons must be accepted as correct and as demonstrating the error of the doctor's theory that "a granular kidney" was responsible for the alleged hæmaturia.

In view of the facts above set forth, the Department holds that the contentions of the attorney in this case relative to the soldier's claim for additional pension have not been and can not be sustained, and that the action appealed from in the said claim was not error. The said action is therefore hereby affirmed.

Relative to the widow's aforesaid claim for pension in her own right, but little more is necessary to be said than has already been set out herein, in passing upon the merits of the soldier's said claim for additional pension, in order to show that her alleged title to a pension rests upon no firmer foundation than did that of her late husband, on account of whose death her claim is based.

The only contention set up in the pending appeal in regard to action appealed from in the widow's claim is that—

There is nothing in the record, or otherwise in the way of evidence, which appears to warrant any conclusion as to the cause of death (the soldier's) than that set forth by Dr. Keiffer in his original affidavit and repeated in his testimony before the special examiner, to wit, hæmaturia.

The Bureau, in the adjudication of the said claim, considered that three factors entered into the cause of the soldier's death, namely, "disease of urinary organs, alcoholism, and senile debility." The last two factors can, of course, be eliminated from consideration as having any connection whatever with his military service, but that they contributed more or less toward hastening, or even causing, his death is, in the opinion of the Department, quite clearly shown by the facts presented in the case.

The appellant, through her aforesaid attorney, seeks to show that the "hæmaturia," which Dr. Keiffer states was manifested just prior to the soldier's death, and which, he thinks, was symptomatic of the existence of "a granular kidney," was, as a matter of fact, due to the alleged disease of kidneys of service origin, and that said disease was the prime and only cause of her husband's demise.

"Disease of urinary organs," one of the factors accepted by the Bureau as entering into the cause of the soldier's death, includes, of course, the kidneys as well as the bladder and other structures concerned in the process of the secretion and elimination of the urine,

some morbid condition of any one of which structures, as heretofore shown, could have been responsible for the said hæmaturia. Inasmuch, however, as no post-mortem was held in the case it is impossible to determine at this time which particular organ, or organs, of the urinary system caused the presence of blood in the soldier's urine, or the extent to which any existing morbid condition of said organ or organs was concerned in the causation of his death.

That the soldier's death, however, was not due to any pathologic condition of his kidneys arising from his military service is so clearly and conclusively shown as to render any further discussion of that phase of the question quite superfluous. This question, then, being thus satisfactorily determined, there is no further point raised by the appellant which remains to be considered.

Therefore, it is held by the Department that the action of the Bureau in the widow's claim, from which the pending appeal was taken, was not error. The said action is hereby affirmed.

PRACTICE—DISMISSAL—APPEALS—ACT JUNE 27, 1890.

CHARLES A. SAMPSON.

The filing of a second application for pension under the act of June 27, 1890, while an appeal from the rejection of a former application is pending, is not a good ground for dismissing the appeal unless the applicant expressly or impliedly asks to have the first application reconsidered.

Medical examination under the first application showed no disability except a slight affection of the heart, and that was not found at a subsequent examination. Age, 57 years; height, 5 feet 10½ inches; weight, 165 pounds.

Held: That a pensionable disability did not exist at the date of filing the first application.

First Assistant Secretary Ryan to the Commissioner of Pensions, December 23, 1899.

Charles A. Sampson, formerly an acting gunner in the United States Navy, filed on June 1, 1897, through his attorney, M. G. Wright, of this city, an application for pension under the act of June 27, 1890, which was rejected by your bureau in March, 1898, on the ground that a ratable disability under the act of June 27, 1890, was not shown. From that action an appeal was taken on April 23, 1898, the contention therein being that the rejection was contrary to the evidence.

Subsequently, on September 6, 1898, while the appeal was still pending, he filed another application in your bureau. On July 13, 1899, you reported, without transmitting the papers, that the claim had been reopened for further consideration "upon the filing of a claim covering the point appealed from," and recommended that the appeal be dismissed. The appeal was dismissed on July 28, 1899. The application filed September 6, 1898, was rejected by your bureau July 21, 1899, on the ground "no ratable disability."

In a letter filed August 15, 1899, the attorney protests against the dismissal of his appeal filed April 23, 1898, and says:

I submit that the action of the bureau in receding from the action appealed from and then reaffirming its former action can not properly dispose of my appeal. I appealed from a particular action of the bureau, which I contended was not in accord with the law and evidence, and I submit that whether my appeal was well taken can not be determined in this manner. I respectfully insist upon a decision of the questions raised in my appeal of April 23, 1898.

Upon examination of the papers it appears that the claimant in his application filed September 6, 1898, did not ask to have the same considered under the provisions of the act of March 6, 1896, or in any other way manifest a desire to have his original application reconsidered by your bureau.

On the other hand, it does not appear that said original application was, in fact, reconsidered by your bureau or treated as an open and pending claim at any time subsequent to its rejection in March, 1898. You did not, as a matter of fact, recede from that rejection, nor was there any likelihood that you would do so. Under these circumstances I am of the opinion that the filing of the application of September 6, 1898, did not operate as a withdrawal of the appeal then pending before the Department.

The rules prohibit an applicant from appealing a claim and at the same time continuing to prosecute it before your bureau; they do not prohibit him, however, from appealing one claim and prosecuting before the bureau another separate and distinct claim. I think the claim filed September 6, 1898, must be regarded as a separate and distinct claim from the one filed June 1, 1897, as they, in effect, claim pension from different dates. When a claimant, in his later application, filed while an appeal from the rejection of a former application is pending, makes a distinct request to have the former application reconsidered, or where he files evidence with a view to having it reopened, or where upon a review of the evidence you find reason to recede from the action upon the former application, the case is otherwise, and an appeal will not be entertained until final action shall have been taken by you. In the case now under consideration the appeal filed April 23, 1898, has been reinstated and, having been reached in the regular order, will now be considered.

The claimant alleged, in his original application, that he was unable to earn a support by manual labor by reason of rheumatism, disease of heart, impaired vision, disease of urinary organs, lameness of back and limbs, and debility. Medical examination on December 1, 1897, showed no evidence of rheumatism, or disease of the urinary organs, or lameness of the back or limbs. As to his eyes, the board reported that they found distant vision; and as to his heart they said:

Heart apex at normal point. We find a mitral murmur, very low tone; force weak; no hypertrophy or dilatation; pulse on exercise is 96; no intermission; no oedema; no cyanosis; no dyspnea. Disability 6/18.

No other disability was found. Claimant was 57 years old, 5 feet 10½ inches in height, and weighed 165 pounds.

Two neighbors testified in an affidavit filed December 11, 1897, that he had not been able to perform manual labor a good part of the time for the past five years, and that for the past seven or eight months he had been totally disabled for performing manual labor. This testimony can not be accepted as outweighing the report of the examining board, which failed to show any disability that would render the claimant unable to earn a support by manual labor. It may be proper to add that an examination by another board, on March 1, 1899, failed to disclose any symptoms of heart disease.

After careful consideration it is believed that the action of your bureau was correct, and the same is therefore affirmed.

ATTORNEY'S—FORFEITURE—EVIDENCE.

JEROME FETTERLY (CLAIMANT).

TABER & WHITMAN (ATTORNEYS).

First. Attorneys are required to call up a pension claim within a year from the time they *prima facie* completed it, if another attorney has appeared in the claim during said year; but if no other has appeared in the claim until after the expiration of said period, then the attorney of record will have preserved his rights, provided he has filed a call slip at any time before the appearance of such other in the claim and subsequent to its completion.

Second. Evidence as to nonvicious habits is not required in claims for increase of pension under the act of June 27, 1890, based upon disability due to diseases or when based upon disability due to hernia, varicocele, and varicose veins which have developed in the ordinary pursuits of the claimant and are not due to traumatic causes, unless called for by the Bureau.

First Assistant Secretary Thomas Ryan to the Commissioner of Pensions, April 16, 1900.

Messrs. Taber & Whitman, of Washington, D. C., on January 15, 1900, entered an appeal from the action of the Bureau denying them further recognition as attorneys in the claim for increase of pension, under the act of June 27, 1890, of Jerome Fetterly, who served in Company I, Twelfth Wisconsin Volunteer Infantry.

Jerome Fetterly was in receipt of pension under the act of June 27, 1890, at the rate of \$6 per month, on account of disease of left testicle and disease of both hands, when, in his behalf, on June 28, 1897, the appellants filed a declaration for increase of pension under said act, in which were alleged as disabling causes, in addition to those above mentioned, chronic diarrhea, effects of measles and sunstroke, general debility, and disease of bladder. On September 13, 1899, they filed a request for medical examination.

Abe Axtell, of Grants Pass, Oreg., in behalf of Mr. Fetterly, filed April 11, 1899, another declaration for increase of pension under the act of June 27, 1890, in which he alleged disease of left testicle and of both hands, rheumatism, and disease of heart. Said declaration contained a power of attorney in Mr. Axtell's favor.

The appellants are denied further recognition upon the ground that under rule 12 they forfeited their rights by neglecting the case for more than one year, in this that they have not filed any evidence as to non-vicious habits, and hence have not completed the case; that more than a year has elapsed from the date they last rendered material service, therefore they are chargeable with neglect; that the pensioner has seen fit to appoint another attorney in the claim, and such attorney is entitled to recognition, as appellants have forfeited their rights to further recognition.

The appellants contend there can be no neglect upon the part of an attorney in a claim for increase under the act of June 27, 1890, until after a call has been made by the Bureau notifying the attorney of its requirements. In other words, they contend that a claim for increase under the act of June 27, 1890, is complete upon filing a declaration for increase.

It is a recognized principle in the practice that when an attorney has *prima facie* completed a claim he is chargeable with neglect only upon notice of its further requirements and his failure to comply therewith within the time allotted by the rules. So if a claim for straight increase under the act of June 27, 1890, is *prima facie* completed by an attorney when he files a properly executed declaration, it follows upon the principle above cited that no further efforts are necessary for the preservation of the attorney's rights until he is notified of the requirements of the claim.

The claim for increase under the act of June 27, 1890, in behalf of Mr. Fetterly was filed by the appellants on June 28, 1897. Within less than a year from that date, viz, on April 9, 1898, the Secretary of the Interior approved a Treatise on the Practice of the Pension Bureau governing the adjudication of the army and navy pensions, compiled by the order of the Commissioner of Pensions. Hence appellants are not chargeable with neglect on the date of the approval of said treatise by the Secretary of the Interior. Furthermore, Mr. Axtell did not appear in the claim until September, 1899. So any contest as to title for recognition should be determined according to the instructions contained in said treatise.

On page 98 thereof, relative to the subject of proof as to non-vicious habits, are found directions as follows:

First. When a certificate of medical examination shows there is no evidence of vicious habits that report will be accepted in the absence of any evidence or reasonable presumption to the contrary as determining the question of vicious habits in claims based upon disease, but if nothing is stated in such certificate relating to

the habits of the claimant the testimony of two credible and competent witnesses, or of the family physician, is required to prove that the diseases alleged are not due to vicious habits. The same rule will apply to claims on account of hernia, varicocele, and varicose veins, when those disabilities have developed in the ordinary pursuits of the claimant's occupation and are not due to traumatic causes.

On page 102 of said treatise, under the subject of "Claims for increase of pension under the act of June 27, 1890," it is directed that—

The rule with regard to proof of non-vicious habits applies to the new disabling causes the same as in original claims.

The new disabling causes upon which this claim for increase is based are diseases. Therefore it will be understood that the appellant's contentions, the Bureau report, and what is said in this decision are directed to the question of the proof required and the proceedings in claims for increase under the act of June 27, 1890, based upon disability due to diseases which are alleged as new disabling causes, in the particular case. Hence there will be no reason for applying what follows in this decision to any other conditions of fact that may arise in claims for increase under the act of June 27, 1890, than the particular conditions here enumerated and as plainly set forth in said treatise in the part herein quoted.

In the report of the Bureau it is argued that—

In claims for increase of pensions under the act of June 27, 1890, in which additional disabling causes are alleged, the same reason exists for requiring attorneys to file evidence that such disabling causes are not the result of vicious habits as exists in original claims under said act.

There has been an unsettled state as to the rules of practice relative to an attorney's duty as to filing evidence of non-vicious habits. Attorneys have contended that no evidence was necessary; that the practice required none. However, when the question arose as to the fee to be allowed in claims for increase of pension under the act of June 27, 1890, long arguments were made by attorneys upon appeals to the Department from actions of the Bureau refusing to pay a fee in excess of \$2 to show the amount of labor involved in securing the allowance of a claim for increase, and that a fee of \$10 was not more than a reasonable compensation. They particularized the services to be rendered in such claims and contended, among other things, that evidence as to nonvicious habits was necessary. The conclusion was reached by the Department that the payment of a fee in excess of \$2 in claims for increase of pensions under the act of June 27, 1890, was forbidden. It may have been that at times the practice required unnecessary evidence in such claims. It was a difficult task to lay down a practice that would insure the Government against the perpetration of frauds and at the same time insure the rights of beneficiaries. By experience it was learned in the course of time what evidence was necessary to establish claims for increase, and this with the least possible burden to a claimant. The result was that the practice was

simplified and proof of facts once required to be shown by the affidavits of witnesses was not required when shown by other and more satisfactory means.

Furthermore, the practice in one particular was dependent and was made possible by the practice in another particular governing in the proceedings in pensions claims. Formerly the diseases or injuries approved as causing the claimant's disability for performing manual labor were enumerated in the certificate issued in claims for pension under the act of June 27, 1890; for some time there has been a change in the practice, and causes of disability are not now enumerated in pension certificates. When such certificates contained mention of the causes of disability approved by the Bureau, it was possible for an attorney to ascertain which of the causes alleged as the basis of a claim for increase were newly alleged; he was thus enabled to limit the evidence as to nonvicious habits, and other proof when necessary, to these newly alleged causes. But, in view of the change above noted, I think that these appellants aptly say they are unable to ascertain from any source that is open to them what new causes of disability they have alleged, and, therefore, if required to file any evidence as to nonvicious habits, they could do nothing more than file duplicate evidence.

In view of the fact that the Treatise on Practice referred to has been approved by the Secretary of the Interior, and the question as to appellants' title to recognition arises under the instructions contained in said treatise, it is only necessary to determine whether, under the conditions arising in this case, the filing of evidence as to nonvicious habits by an attorney is necessary for the preservation of his rights to the attorneyship. In my opinion, such evidence is not necessary unless it is called for by the Bureau. In this claim a call for such evidence has not been made. Therefore it can not be held that the appellants have forfeited their right to further recognition from the fact that they have not filed evidence as to nonvicious habits.

The Bureau also submits that appellants are in default under rule 12 because of their failure to call up the case within the proper time. The rule is that after an attorney has prima facie completed a claim—that is, filed such evidence as he is expected to file without a call by the Bureau—he must call up the case. A further requirement of the practice in this particular is that the call must be within a year (a reasonable time) from the time the claim was prima facie completed if another attorney has appeared in the case during that period, but if such other does not appear in the claim until a later date, then a call will preserve the rights of the attorney of record if filed at any time prior to the appearance of such other in the case. In default thereof the attorney of record forfeits his rights.

Calls for status for many years have been regarded as a means for preserving an attorney's rights. The filing of such calls is construed

as requests for action when there is delay in the adjudication of a claim. Calls for status may be the only documents in a claim filed by the attorney, as in a claim for increase like the one under consideration, where the claimant himself forwards the declaration to the Bureau indorsed as filed by the attorney who is therein appointed to prosecute the case. I see no reason why the practice should be modified in this instance. The appellants state that they called up the case September 6, 1898. No documents emanating from the appellants are found among the papers from June 28, 1897, the date they filed the declaration, to September 13, 1899, when they did file a call for status (request for examination). This call was not filed until five months after Mr. Axtell appeared in the claim, and not until more than a year had elapsed from the time they filed the declaration. For this reason, under rule 12 of the rules of practice, the appellants forfeited their rights in the case. As they have been superseded in the attorneyship, action denying them further recognition was proper.

This rule is cited by the Bureau in its report upon the appeal of Mr. Morris herein.

This conclusion was reached upon reasoning that the Bureau is authorized by law to determine questions as to an attorney's title to a fee, and when it has decided the question title to the fee is vested in the attorney in whose favor the decision is rendered; and if a contesting attorney acquiesces in such action when notified thereof the former title to the fee becomes complete. When it is considered that it is the special province of the Bureau to determine an attorney's title to fee subject to revision by this Department, his title is at best a precarious one unless a limit is placed upon the right of a contesting party to enter an appeal to this Department for a review of the decision of the Bureau in this particular.

The Department, in an opinion in the case of John Henry Judd, certificate No. 39515, dated May 15, 1899 (33 Fee P. L., Bk. 203), held that—

Where an attorney acquiesces in an action of the Bureau denying him a fee on issue to allow pension in a claim, for a period of one year from the date he was notified thereof—that is, fails to enter an appeal from said action within the year—he thereby forfeits whatever title he may have to the fee certified on said issue.

In this case the appellant acquiesced in the action of the Bureau in denying him a fee on the allowance of pension October 30, 1896, for a period of over three years, these facts being the question at issue within the foregoing rule, and he can not now be permitted to question the action of the Bureau as to the matter of fee under consideration.

INSTRUCTIONS.

MINORS' PENSION—LIMITATION.

Section 4702 of the Revised Statutes does not require that application by minor children for pension thereunder be made while they are under 16 years of age.

In claims where the children had attained the age of 16 years before July 1, 1880, but had not filed application for the pension prior to that date, it is recommended that a judicial decision of the question should be obtained in a test case for the future guidance of the Secretary of the Interior and the Commissioner of Pensions, and Congress has been requested to enact a law which would permit this to be done, and until further directions consideration of such claims will be withheld.

Secretary E. A. Hitchcock to the Commissioner of Pensions, May 26, 1900.

I have given careful consideration to communications from your Bureau relating to the right to pension, under section 4702 of the Revised Statutes, of children under 16 years of age at the time of the death of the father, and who did not present to the Pension Bureau an application for such pension until after they had attained the age of 16 years.

Section 4702 embodies the provisions of section 2 of the act of July

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14, 1862 (12 Stat., 566), and section 4 of the act of March 3, 1865 (13 Stat., 499). As amended by the act of August 7, 1882 (22 Stat., 345), the section reads as follows:

If any person embraced within the provisions of sections forty-six hundred and ninety-two and forty-six hundred and ninety-three has died since the fourth day of March, eighteen hundred and sixty-one, or hereafter dies, by reason of any wound, injury, or disease which under the conditions and limitations of such sections would have entitled him to an invalid pension had he been disabled, his widow, or if there be no widow, or in case of her death without payment to her of any part of the pension hereinafter mentioned, his child or children under sixteen years of age, shall be entitled to receive the same pension as the husband or father would have been entitled to had he been totally disabled, to commence from the death of the husband or father, to continue to the widow during her widowhood, and to his child or children until they severally attain the age of sixteen years, and no longer; and if the widow remarry, the child or children shall be entitled from the date of remarriage, except when such widow has continued to draw the pension money after her remarriage, in contravention of law, and such child or children have resided with and been supported by her, their pension will commence at the date to which the widow was last paid.

The only change made in this section by the act of August 7, 1882, was the addition of the exception appearing at the end of the section as just quoted, but this change does not affect the matter here under consideration.

The pension granted to the children by this section is only for the period while they are within the age of 16 years, but the section does not in terms place a limitation upon the time for claiming such pension and construing it in the light of section 6 of the act of July 27, 1868 (15 Stat., 236), section 15 of the act of March 3, 1873 (17 Stat., 566, 572), section 4709 of the Revised Statutes, and section 2 of the act of March 3, 1879 (20 Stat., 469), which clearly recognize the incapacity of the children to prosecute a claim for pension while within the age of 16 years, it seems manifest that it was not thereby intended that their right to the pension should be lost for failure to assert it during such recognized incapacity. Apart, however, from the influence of other legislation, section 4702 in itself affords some affirmative evidence that it was not contemplated that an application for pension by or in behalf of the children could be made only while they are within the age named. By its terms the widow, if there be one, is entitled to the pension during her widowhood, but if she dies without having received any part thereof the children are entitled thereto during that portion of her widowhood when they were under 16 years of age. This contingent right of the children would not accrue and could not be asserted until the widow's death, and since her life would frequently, if not usually, continue until the children had severally attained the age of 16 years, it follows that in such instances the application of the children could not be filed until they had passed that age.

I am therefore of opinion that section 4702 does not require that

application by the children for pension thereunder be made while they are under 16 years of age.

Another question which arises, however, affects only claims where the children had attained the age of 16 years before March 3, 1879, or perhaps before July 1, 1880, but had not filed application for the pension in your bureau prior to July 1, 1880, and is whether such claims are barred by section 2 of the act of March 3, 1879 (*supra*).

This question, about which the officers charged with the administration and execution of the pension laws have differed in opinion, I consider a difficult and important one, and it has seemed better for the claimants in such cases, as well as for the pension service, that a judicial decision of the question should be obtained in a test case for the future guidance of the Secretary of the Interior and the Commissioner of Pensions. With that in view I submitted to each House of the present Congress a report (Senate, No. 1040) and accompanying bill, with the recommendation that there be legislation which would permit this to be done. The bill is now pending before Congress (S. 4251 and H. R. 10868). The number of claimants affected and the amounts involved are such that, considering the difficulty and importance of the legal question presented, I believe a judicial opinion should be obtained if it can possibly be done.

I therefore direct: (1) That until further direction you will withhold consideration of all claims arising under section 4702, where the children had attained the age of 16 years before March 3, 1879, or before July 1, 1880, and had not filed in the Pension Bureau an application for the pension prior to the date last named; and (2) that you will resume and proceed with the consideration of all claims under said section where the children were under 16 years of age on July 1, 1880, or were born since that date, irrespective of the time of filing the application.

INDEX TO DECISIONS.

ACT OF MARCH 25, 1862.

(See SERVICE, 58.)

ACT OF AUGUST 7, 1882.

(See ADULTEROUS COHABITATION, 286.)

ACT OF MARCH 19, 1886.

(See MARRIAGE, 12.)

ACT OF JANUARY 29, 1887.

(See DEPENDENCY, 28; SERVICE, 139; REMARRIAGE, 324; SERVICE IN MEXICAN WAR, 425.)

ACT OF MARCH 4, 1890.

(See RATE, 443.)

ACT OF JUNE 27, 1890.

(See DECLARATIONS, 177, 365; DEPENDENCE, 67, 326; DESERTION, 355; DISCHARGE, 14, 82; DISLOYALTY, 72; INSANE OR HELPLESS MINORS, 224, 368; MARRIAGE OF SLAVES IN KENTUCKY, 441; PRACTICE, 458; RATE, 176, 299; RATES AND RATING, 397, 414; RATING, 256, 261; REMARRIAGE, 244; SERVICE, 8, 18.)

ACT OF MARCH 3, 1891.

(See FEE, 412.)

ACT OF JULY 14, 1892.

(See COMMENCEMENT, 66.)

ACT OF JULY 27, 1892.

(See SERVICE, 26.)

ACT OF JANUARY 5, 1893.

(See INCREASE, 64.)

ACT OF MARCH 6, 1896.

(See APPEALS, 250; PRACTICE, 73, 321.)

ACT OF MARCH 3, 1899.

(See ATTORNEYS, 236.)

ADMISSIONS.

(See EVIDENCE, 80; MARRIAGE AND DIVORCE, 297.)

These figures denote the page in volume

ADULTEROUS COHABITATION.(See also **MARRIAGE**, 153.)

Adulterous cohabitation of a soldier's widow, on or subsequent to August 7, 1882, terminates her pensionable status.

Rebecca Kilbee (widow)..... 286

Section 2 of said act of August 7, 1882, is in no sense a penal statute, nor is to be construed according to the rule of construction of penal statutes, but is remedial and is liberally construed. (*Matilda Ague*, P. D., 327.)

Ibid.

The words "adulterous cohabitation" in said act are not used in their strict legal sense, but in their popular signification, to indicate the open and notorious illicit intimacy indicative of immorality. (*Alice Gray*, 7 P. D., 134.)

Ibid.

AID AND ATTENDANCE.

The rate in this case was reduced from \$72 per month to second grade upon evidence adduced from special examination, showing that the former rating was excessive.

The soldier is pensioned for "disease of spine and resulting curvature and insanity," and it is contended that by reason of his mental condition it is necessary to have an attendant secretly follow and watch him when he appears in public for his protection in case of necessity.

Held, 1. That such personal aid and attendance of another person, as it is contended is accorded the pensioner, is necessarily based upon apprehension that it may be—not upon the fact that it actually is—needed, and it does not therefore come within the purview of the provisions of either the act of March 4, 1890, or the act of July 14, 1892.

2. The allowance of the \$72 rate is not warranted merely because insanity happens to be one of the disabilities for which pension has been granted; but the degree of helplessness specified by law must be shown to exist before title to said rate is established. (*James Caton*, P. D., vol. 6, p. 159.)

Eppenetus W. McIntosh..... 172

ALABAMA STATUTE.(See **DECLARATIONS**, 292.)**ALIENS.**(See **DISLOYALTY**, 72.)**AMENDMENTS.**(See **DECLARATIONS**, 177, 365.)**ANTEREBELLION PENSIONS.**(See **LIMITATION**, 417.)**APPEALS.**(See also **PRACTICE**, 458.)**Generally.**

Where more than one claim by the same claimant is involved in an adjudication an attorney in his appeal must specify which claim he desires reviewed.

Archibald F. Thomas..... 374

Act March 6, 1896.

1. In considering claims under the act of March 6, 1896, before the commencement of pension, granted after a former claim had been rejected, may date from date of filing such first declaration, it must be shown, not only that at the date of filing such declaration he was suffering from a disability, but that such disability was of a permanent character, rendering him unable to earn a support.
2. The printed form of appeal filed by H. D. Phillips in this and numerous other cases will not hereafter be considered, unless it contains material averments in addition to the printed matter, as it does not present any issue of fact and the issue of law has been decided.

Wesley Dalrymple (H. D. Phillips, attorney) 250

ARREARS.

(See CONSTRUCTION, 99.)

ASSIGNMENT.

(See ATTORNEYSHIP, 143.)

ATTORNEYS.

(See also LIMITATION, 421; PRACTICE, 390.)

Evidence.

Evidence as to nonvicious habits is not required in claims for increase of pension under the act of June 27, 1890, based upon disability due to diseases or when based upon disability due to hernia, varicocoele, and varicose veins which have developed in the ordinary pursuits of the claimant and are not due to traumatic causes.

Jerome Fetterly (Tabor & Whitman, attorneys) 460

Forfeiture.

Attorneys are required to call up a pension claim within a year from the time they prima facie completed it, if another attorney has appeared in the claim during said year; but if no other has appeared in the claim until after the expiration of said period, then the attorney of record will have preserved his rights, provided he has filed a call slip at any time before the appearance of such other in the claim and subsequent to its completion.

Jerome Fetterly (Tabor & Whitman, attorneys) 460

Recognition.

In a claim under the provisions of the act of March 3, 1899, an attorney is entitled to recognition upon filing proper evidence of his authority to prosecute said claim.

Wife of Hiram A. Davis (Milo B. Sterens & Co., attorneys) 236

1. The Commissioner of Pensions can not refuse recognition to agents or attorneys regularly employed by wives or minor children of pensioners who have deserted their wives or children, under the act of March 3, 1899, when such agents or attorneys are authorized to practice before the Department.
2. The methods of making payment to agents or attorneys for services in prosecuting an application for the divided payment of a pension under said act are not controlled by sections 3 and 4 of the act of July 4, 1884 (23 Stat., 98), but are matters of agreement and adjustment between the parties over which, in the absence of abuse or misconduct on the part of the agent or attorney justifying disbarment, the Commissioner of Pensions has no authority.

Ibid.

3. Agents and attorneys rendering services in proceedings under said act must look to those by whom they are employed, and not to the Pension Bureau, for payment for their services.

Ibid.

ATTORNEYSHIP.

(See FEE, 144, 357.)

Assignment or substitution.

"The written consent of a claimant is declared essential to a valid assignment of an attorneyship or agency from one attorney or agent to another * * *." (Rule 2, Rules of Practice before the Commissioner of Pensions.)

John W. Short (James T. Knowland & Son)..... 143

Death of client.

Where a claimant dies prior to the final rejection of pension claim by the Bureau of Pensions the authority of the attorney of claimant is terminated; and without further authority from those succeeding to the right, in whole or in part, of the deceased claimant the attorney has no right, power, or authority to appeal from such Bureau action. See cases of Phineas D. Judson (8 P. D., 185); Americus Mayo (7 P. D., 531); James Keating (Ibid., 280); and J. Ambler Smith and Samuel H. Lewis (Ibid., 69.)

Margaret Hawkins (widow)..... 191

CASE OF DIFFICULTY AND TROUBLE.

(See FEE, 147.)

CERTIFICATE OF DISABILITY.

(See EVIDENCE, 196, 319.)

CIRCUMSTANTIAL EVIDENCE.

(See EVIDENCE, 289.)

CIVILIAN EMPLOYEES.

(See SERVICE, 133, 169, 182.)

COLORED AND INDIAN SOLDIERS IN KENTUCKY.

(See MARRIAGE, 157.)

COLORED PERSONS.

(See DEPENDENT RELATIVES, 104.)

COMBINING RATINGS.

(See RATING, 185.)

COMMENCEMENT.

(See also PRACTICE, 87; RATE, 443.)

Increase to the intermediate grade (\$50) provided by the act of July 14, 1892, must, by the express terms of the act, commence from the date "of the certificate of the examining surgeon or board of examining surgeons showing such degree of disability, and made subsequent to the passage of" the act.

John Johnson..... 66

COMPOUNDING RATES.

(See RATING, 21.)

CONSANGUINITY.

(See MARRIAGE, 389.)

CONSOLIDATION OF CLAIMS.

(See FEE, 146.)

CONSTRUCTION.

(See also DEATH CAUSE, 90.)

A special act approved June 8, 1898, entitled "An act to construe an act approved June 3, 1881," rerating and including the disability of claimant "with that of a class of pensioners who have lost an arm at or above the elbow;" and providing that said act of June 3, 1881, "be construed to be continuous in its provisions," and that "the Commissioner of Pensions is hereby instructed to reenter and continue the name of said pensioner on the roll with the class of pensioners mentioned in said act, at the rate of pension provided for said class, from and after the passage of this act," is not retroactive in its effect and does not authorize an increase of pension prior to the approval of said act, nor does it authorize a rerating or the granting of arrears of pension.

Alonzo B. Chatfield 99

CONSTRUED.

(See DEPENDENCY, 28.)

CONTRACT SURGEONS.

(See SERVICE, 133.)

COOPERATION WITH THE NAVY.

(See SERVICE, 401.)

DEATH.

(See EVIDENCE, PRESUMPTIONS, 6.)

DEATH CAUSE.

(See also NEGLIGENCE, 101.)

Evidence—Lay testimony.

Lay testimony, the only evidence adduced in the case at bar relative to the alleged origin and continuance of disease of kidneys, is utterly inadequate to show the existence at any time of any morbid condition of said organs, especially when a chemical analysis and microscopical examination of the soldier's urine, made but two months prior to his death, showed conclusively that he had no organic disease of kidneys.

Maria Harms (widow) 453

Pathological sequence.

The evidence shows the fatal disease of the heart to have arisen either from diarrhea, malarial poisoning (pensioned causes), or from rheumatism. All of said diseases may have been an important factor in inducing the fatal disease. The special examination shows rheumatism to have been of service origin. The medical referee holds that fatal disease resulted from rheumatism. *Held:*

1. Death was the result of diseases contracted in the service and line of duty.
2. The opinions of the medical referee are not binding upon the Secretary, but are expert evidence, and will be treated as such by the Department.

Julia A. E. Watkins (widow) 202

Predisposing cause.

1. Where the evidence, lay and medical, goes to show that the cause for which pension was granted to the soldier was complicated with a disease which was the immediate cause of his death, the Department will sustain the widow's claim.
2. The pension laws should be construed in the liberal and generous spirit which prompted their enactment, and where doubts can not be resolved by the evidence, presumption should incline toward the claimant.

Nancy A. Stires (widow) 90

DEATH OF CLIENT.

(See ATTORNEYSHIP, 191.)

DECLARATIONS.

(See also INSANE PERSONS, 109.)

Act June 27, 1890.—Amendments.

1. In the adjudication of this claim disability from insanity was not considered, because not alleged, although shown to have existed at time of filing declaration and continuously afterwards. This action was sustained by a decision of February 5, 1897, upon the ground that it was in accordance with the rules of practice. The claimant had died before such rejection and the rendering of said decision without filing supplemental declaration.
2. In the "instructions" relative to declarations under said act, dated July 28, 1897 (9 P. D., 93), said rules of practice were abrogated and others substituted, which permit the consideration of all disabilities proved to exist, whether alleged or not, in determining title. The former decision is accordingly overruled and the action of the Bureau is set aside for the purpose of having claim readjudicated in conformity with said "instructions."

Simon P. Eaves (deceased) 177

When a claimant for pension under the act of June 27, 1890, in the language of the act alleges in his declaration that he served ninety days or more in the military or naval service of the United States during the late war of the rebellion, and was honorably discharged; that he is suffering from a mental or physical disability of a permanent character, not the result of his own vicious habits, which incapacitates him from the performance of manual labor in such a degree as to render him unable to earn a support, it is such compliance with all requirements of the law as must entitle the claim to consideration, notwithstanding the specific cause of disability is not named; and it is, therefore, hardly necessary that the widow of a deceased applicant for pension under the second section of said act should file an amendatory affidavit covering the disabilities shown upon examination, unless it be to designate their duration.

Tony Hudson 365**Execution of.**

An application for pension executed on the day of the applicant's discharge from the service is null and void.

George M. Hoffman 268

Within the contemplation of the law, in the State of Alabama, the official act of the clerk of a probate judge therein is the official act of said judge; therefore, a declaration for pension is made before said judge if executed in the presence of his clerk only, and is legally executed within the purview of section 4714, Revised Statutes, and the act approved July 1, 1890.

Seaborn Williams 292**Sufficient averments in.**

A declaration for pension containing the necessary averments of facts is valid, although it may have been executed upon the same day of muster out, after the claimant has been discharged and is entirely severed, in fact and in law, from the service and is no longer subject to military duty or discipline.

William H. Hagarty 359**DECREE.**

(See JURISDICTION, 434; MARRIAGE AND DIVORCE, 409.)

DECREE OF NULLITY.

(See MARRIAGE AND DIVORCE, 238, 284.)

DEPENDENT PARENTS.

(See also RATE, 299; REMARRIAGE, 244.)

Soldier was born in 1843, the fruit of a slave marriage consummated in accordance with slave customs in Mississippi in 1833, and died January 14, 1896. His mother died in Mississippi in 1863, six years before said marriage could have been ratified under the constitution of that State. His father filed a claim, June 2, 1897, for a pension under the act of June 27, 1890, as dependent father.

Held:

1. That the marital relation between soldier's father and mother was null and void in law, and claimant has no legal status as the father of soldier.
2. Neither section 4704 nor 4723, Revised Statutes, affect in any manner the dependent father's claim.
3. The emancipation proclamation did not become operative except when enforced by the armed forces of the United States, nor did it change the legal status of persons held in slavery.

Daniel Bird (father) 104

Widows, act June 27, 1890.

Claimant, who is 72 years of age, and has no other property or income than a farm of 140 acres, worth from \$500 to \$700; two notes, one of \$50, another of \$55; two notes of \$9 each, and personal property worth \$10, is without other means of support than her daily labor, and dependent within the meaning of the act of June 27, 1890.

Sally Hodgkin (widow) 326

1. It is not the income alone of which a widow is in receipt, but it is all of the resources possessed by her from which a support may be derived, save that of her daily labor, which must be the basis of judgment as to her dependency within the meaning of the act of June 27, 1890; and a claimant for widow's pension under said act, who, at the time of filing her claim, owned in fee simple 60 acres of land, unencumbered, of the value of \$2,000, together with the use during her natural life of 80 acres, assessed at \$2,300, is not pensionable. The law does not take into consideration either a comfortable or adequate support.
2. The act of June 27, 1890, pensions for a condition existing at the date the widow filed her application, and the proof must go to the facts as they existed at that time.

Rhoda A. Gass (widow) 9

Claimant, who owned real estate of the value of \$6,000, conveyed the same to her children for a consideration of \$20; and it is held that she could not create a pensionable status nor be deemed without other means of support than her daily labor.

Mary E. Hughes (widow) 67

A widow before becoming 62 years of age is not entitled to pension under the act of January 29, 1887, unless she has no other means of support than the ordinary proceeds of her manual labor and the contributions of others not legally bound to aid in her support.

Johanna Gates (widow) 28

DESERTION.

(See also INCREASE, 232; SERVICE, 169.)

As claimant deserted and was never discharged from his second service during the war of the rebellion, he has no pensionable status under the act of June 27, 1890, but is pensionable under the general law as to disabilities received in his first service, from which he was discharged, his claim being filed subsequent to July 1, 1880.

De Witt C. Nash 141

A minor 18 years of age could in 1861 enlist in the regular or volunteer service, and prior to the act of May 15, 1872, such enlistment was valid without the written consent of parent or guardian.

Soldier enlisted June 1, 1861, in Company I, First Minnesota Volunteer Infantry, at the age of 19 years and 10 months. He deserted from said service June 19, 1861, and the charge of desertion has not been removed on the records of the War Department. While a deserter he again enlisted in Company H, First Minnesota Volunteer Cavalry, November 3, 1862, and was discharged November 24, 1863.

Held, That his first enlistment was valid and his desertion therefrom debars his widow's right to pension under the act of June 27, 1890. See the cases of John Norton (9 P. D., 382); Instructions to Commissioner of Pensions (4 P. D., 382); Susan Colgin (5 P. D., 127); James Cullen (6 P. D., 72); Kate Eibel (7 P. D., 179); Mary E. Walker (ibid, 197); Elizabeth J. Halfhill (8 P. D., 467); Bessie C. Wheeler (9 P. D., 155); Susan Williams (10 P. D., 82), and De Witt C. Nash (ibid, 141).

Aura Hetherington (widow) 353

It appearing that the official record of the deceased soldier's military service is incomplete, and did not furnish sufficient data upon which to base the action rejecting this claim, said action is reversed, with directions that the same be reopened, the War Department be called upon for additional information relative to the length of the term for which the deceased soldier first enlisted in Company H, Nineteenth Kentucky Volunteer Infantry, and the claim readjudicated on its merits in accordance with the decision of this Department in the case of John Norton (9 P. D., 382).

Sarah Ann Sullivan (widow) 55

DISABILITY.

(See also INSANE OR HELPLESS MINOR, 22; PRACTICE, 12, 13; RATE, 176; RATING 21, 261, 256.)

The degree of inability to perform manual labor is a medical question only so far as a claimant's physical and mental condition is shown by medical evidence. And there is no better evidence as to his physical ability or inability than an accurate description of normal and abnormal conditions disclosed by a careful medical examination made by experienced practitioners.

Warren Thompson 276

DISCHARGE.

(See DESERTION, 141, 355.)

The soldier having been dishonorably discharged from the service in the war of the rebellion, his widow has no title to pension under section 3 of the act of June 27, 1890.

Rosa Rupp (widow) 14

The deceased soldier was never discharged from his military service during the war of the rebellion, but was murdered while in the service under his first and only enlistment, at a time when absent from his command on a pass.

Held, That his widow is not entitled to pension under the provisions of section 3, act of June 27, 1890.

Susan Williams (widow) 82

DISLOYALTY.

Act June 27, 1890.

Aliens who aided and abetted the late rebellion against the authority of the United States are not entitled to pension under the act of June 27, 1890. Their title is barred by the provision of section 4716, Revised Statutes.

Henry Mackrill, alias Mackey 72

Section 4716 of the Revised Statutes is applicable to pension claims filed under section 2 of the act of June 2, 1890, and the decision in the case of G. W. Gilbert (9 P. D., 279), under the advice of the Assistant Attorney-General, is adhered to.
Calvan Shinaugh 210

General law.

Prisoner of War Records show that pensioner was paroled for services in the engineer workshops at Savannah, Ga., late in October, 1864, and continued to perform labor in said shops until his final parole, November 18, 1864, thus voluntarily aiding and abetting the rebellion against the authority of the United States. Under the provisions of section 4716, Revised Statutes, he is not entitled to pension, and the dropping of name from the rolls was proper.

Peter Walther 125

The record shows that the soldier enlisted in the rebel army while a prisoner of war at Andersonville, and continued therein until captured by Union forces at Egypt Station, Miss., and that he was subsequently confined, with other rebel prisoners, at Alton, Ill., until March 17, 1865, when he enlisted in the Fifth United States Volunteers, which was made up of recruits from rebel prisoners.

Held, That the record not only fails to sustain the appellant's contention that his enlistment in the rebel army was involuntary and an expedient to enable him to return to the Union side, but is inconsistent with it, and the widow's pension was properly terminated.

Mary J. Dupra (widow) 86

DISMISSAL.

(See PRACTICE, 458.)

DISTRICT OF COLUMBIA.

(See MARRIAGE, 110, 118.)

DIVORCE.

(See JURISDICTION, 434.)

ELECTION.

Claimant being in receipt of a pension under the act of June 27, 1890, his claim under the general law having been subsequently admitted, it was finally rejected on the ground of no benefit, and claimant was notified of such rejection, but not of the fact that it had been admitted on its merits.

Held, Section 4715 vests the right of election in the pensioner alone, and said right is not lost, limited, or qualified by the opinion of any other person as to whether or not a payment under the general law would be beneficial. The latter part of the first proviso of section 2, act of June 27, 1890, expressly reserves the right of one entitled to the benefit of said act to receive his pension under the general law, if his claim under such law is proved. It is for the pensioner, under such circumstances, to make election, and he should be notified of the right to do so, issue of certificate under the general law being withheld until choice is made by claimant.

Joseph Muckenstorm 61

EMANCIPATION.

(See DEPENDENT RELATIVES, 104; MARRIAGES OF SLAVES, 36.)

ENGAGED IN ATHLETIC SPORTS.

(See LINE OF DUTY, 217.)

ENLISTMENT.

(See SERVICE, 169.)

ESTOPPELS.

(See EVIDENCE, 80.)

EVIDENCE.

(See also ATTORNEYS, 460; DEATH CAUSE, 453; DISLOYALTY, 86; LINE OF DUTY, 345; MARRIAGE, 328, 393, 431, 446; MARRIAGE AND DIVORCE, 294, 297, 304, 311, 348, 409, 423; MARRIAGE OF SLAVES, 36; PATHOLOGICAL SEQUENCE. 52.)

New Disability.

The rule announced in the case of *Thomas H. Strange* (7 P. D., 36), that "whenever, in a claim for increase of pension under the general law, an applicant, after long and unexplained silence, alleges a new disability of which there is neither record nor medical evidence, the adverse presumption arising from the absence of such evidence is open to rebuttal by the testimony of officers, comrades, and neighbors; but such presumption is not outweighed by the mere recital, under oath, of assertions made long since by the soldier himself or by general and vague statements of witnesses, and can be overcome only by direct and positive proof of incurrence and existence, or by satisfactory evidence as to facts and circumstances from which said incurrence are to be naturally, fairly, and reasonably inferred," appears to be well founded, and its proper application can work no injustice to either the claimant or the Government.

Mathias M. Bruner 46

Presumptions.

The soldier deserted claimant in New York in 1846 and went to Missouri, where he married another woman, from whom he separated after a few years, and shortly afterwards left there and has not been heard from since. He is now, if living, about 82 years of age.

Held, That the facts do not warrant a presumption of death, as soldier's absence is not unexplained.

Sophia Pearson (widow) 6

The statute of Kentucky relative to presumption of death applies only where the absent person shall have gone from the State and does not return to the State for seven successive years, and there being no evidence in this case that claimant's first husband ever left the State, his death can not be presumed, and her marriage to the soldier was, therefore, null and void.

Priscilla Childers (alleged widow) 51

Record.

The record, based on claimant's own statement in writing, shows that the disability alleged, disease of heart, existed prior to his enlistment; claimant can not contradict this record, even though his statement be false; case of *John H. Ruhl* (8 P. D., 351.)

Edmund R. Neuchard 80

The statement of the claimant's captain in a certificate of disability, made in the regular discharge of his official duty, as to the origin of the disability for which pension is claimed, is not overcome by his contrary statement made from memory eight or nine years afterwards.

John Schubert (deceased) 196

A record made at the time of the soldier's discharge, by the surgeon who recommended his discharge, showing that the disability was incurred about the time he alleges and "whilst in the performance of his duty" is accepted as sufficient evidence of incurrence in line of duty, there being nothing in the case, after a special examination, tending to discredit such record, and no other evidence being obtainable.

Daniel M. Delo 319

The record of treatment of this pensioner for diarrhea on one occasion during his first term of service as a private in Company G, Sixth Ohio Volunteer Infantry, in the absence of any evidence whatever of the existence or continuance of said disease during the remainder of his service in said organization, at the date of his discharge therefrom, during the period of two years that intervened between said service and his second enlistment and muster in as an officer of Company K, One hundred and eighty-sixth Ohio Volunteer Infantry, or at the date of his second enlistment, is not alone sufficient to overcome presumption of soundness at the date of said second enlistment, or to warrant or justify the action reducing the pension for chronic diarrhea that had been allowed him from date of discharge from his second term of service as of the rank of captain, to the rank and rate of a private, and said action was erroneous.

It necessarily follows that the action withholding payment of the pension at present allowed to reimburse the Government for excess of payments made to the pensioner as of the rank of captain was likewise error.

Charles Hebel 448

Sufficiency of.

Appellant alleged that by reason of his horse falling upon him he sustained a hernia and injury to ankle and privates. The evidence submitted, which has been accepted as sufficient to show incurrence of hernia, shows as satisfactorily the incurrence of the other named results of said fall, and will be accepted to establish the claim on account of same.

M. R. William Grebe..... 92

Soldier, after repeated failures to obtain work, both mentally and physically enfeebled by a wasting and incurable disease, with starvation staring him in the face, his wife dangerously ill in a public hospital, and with no prospect or hope of relief in the immediate future, declared his intention to take his life and thus put an end to his misery in this world. Immediately thereafter, on July 22, 1887, he disappeared, and although it was not absolutely or positively known, it was universally accepted and believed as a fact by all conversant with the circumstances at the time, that he had thrown himself into the Mississippi River and was drowned. These facts were accepted by the Bureau of Pensions as sufficient to raise the presumption of the fact of soldier's death under the provisions of the act of March 13, 1896, but not sufficient to raise the presumption of death prior to the expiration of seven years after his disappearance.

It is held that the evidence in this case is sufficient to show the death of soldier on July 22, 1887, and to entitle the widow to pension under the act of June 27, 1890, and March 6, 1896, from the date of filing her first application, September 22, 1890.

Sybillia Heinz (widow)..... 289

EXECUTION OF PAPERS.

(See DECLARATIONS, 268, 292.)

FEE.

(See also ATTORNEYS, 403; LIMITATION, 421.)

Attorneyship.

Material evidence filed by an attorney entitled to recognition, at any time before the admission of the claim, though it does not reach the case until after the same is allowed, is such service as may warrant the payment of a fee.

Joseph Dronant (W. W. Dudley, attorney) 144

Where a pension claim has been rejected by the Bureau of Pensions and its action has been affirmed by the Department, the claim is at an end, and the authority

of the attorney is terminated. However, it is not necessary for said attorney to obtain a new power of attorney in his favor for the institution of new proceedings, provided the claimant cooperates with him therein and has not in the meantime authorized another attorney to institute such proceedings.

James Rose (Milo B. Stevens & Co., attorneys)..... 357

Consolidation of Claims.

The several applications for pension (to which a widow may be entitled in her own right) in behalf of the widow and minor children of a soldier on account of his services and death constitute but a single claim for pension, and when the several applications are made through the same attorney but one fee can be paid to him.

Dah Ya Ne, Ah Kee'La Nee Gar (John L. Springston, attorney)..... 146

Fee Agreements.

Proceedings were instituted by the Government which resulted in action by the Bureau in withholding pension to reimburse the Government. Upon appeal, action was reversed and certificate issued to allow payment of pension withheld; on said issue no fee was paid. Fee agreements for \$25 were filed.

Held, As the Commissioner of Pensions has not ordered that fee agreements be recognized in proceedings like those described, the fee agreements filed applicable to such proceedings in this particular claim should not be recognized. Also, that in the absence of authority to recognize fee agreements in such proceedings in claims, such fee shall be certified as the Commissioner may see fit to allow, not exceeding \$25 in claims under the general law. Case of George D. Hilton (8 P. D., 182). in so far as it conflicts herewith, is overruled.

Norman Davis (C. E. Foote, attorney)..... 147

Attorneys are not bound by fee agreements limited in their application to a claim for increase on account of a new disability to prosecute a claim for straight increase.

As the fee agreements filed were expressly limited in their application to the claim for additional pension, the appellants are entitled to the fee stipulated in said agreements for securing the allowance of additional pension, and also to the fee provided by law for securing the allowance of straight increase.

Demmon S. Decker (Milo B. Stevens & Co., attorneys) 198

Forfeiture.

An attorney, when entitled to a certain sum as a fee, and his title thereto is conceded by the Bureau at the time when a less sum in lieu thereof is certified to him, does not forfeit his right to the remainder of the fee through his failure to enter a protest to said action of the Bureau in not certifying to him the proper amount.

Samuel Wilson..... 412

Practice.

Appellant's claim under the act of June 27, 1890, was allowed at the rate of \$8 per month from date of filing, July 14, 1890; at the same time his claim under the general law was allowed at \$4 per month from January 13, 1890, but the Bureau of Pensions refused to issue a certificate thereon, as it would not afford claimant any benefit, as the full amount of pension would be required to pay the attorney's fee (\$25) in the case. The attorney in the case waived the fee agreements, and agreed to receive a fee of \$10, and claimant requested the issue of a certificate.

Held, That under these conditions the certificate must be issued in the claim under the general law.

Miles Gilder (Fay F. Root, attorney) 167

Rank.

A fee in excess of \$10 can not be paid in a dependent mother's or any other case under act of June 27, 1890.

Sarah O. Stockwell (mother) (Milo B. Stevens & Co., attorneys)..... 428

Refundment.

Where a pension under the act of June 27, 1890, is withheld for the purpose of reimbursing the United States for money paid to a claimant in a fraudulent claim under the general law, payment of fee need not be made until the United States has been reimbursed in full; but if payment of fee is made prior thereto the attorney can not be compelled to refund if otherwise entitled.

Milton W. Bailey (Milo B. Stevens & Co., attorneys)..... 150

Forfeiture—Appeals.

When an attorney acquiesces in an action of the Bureau denying him a fee on an issue to allow pension in a claim, for a period of one year from the date he was notified thereof—that is, fails to enter an appeal from said action within the year—he thereby forfeits whatever title he may have to the fee certified on said issue.

Milton M. Rappleye..... 464

FEE AGREEMENTS.

(See FEE, 147, 198.)

FIRST GRADE.

(See RATE, 443.)

FORFEITURE.

(See ATTORNEYS, 460; FEE, 412.)

FRAUD AND MISTAKE.

(See REIMBURSEMENT, 84; FEE, 150; MARRIAGE AND DIVORCE, 258.)

FEE AGREEMENTS.

(See FEE, 147; 198.)

FIRST GRADE.

(See RATE, 443.)

FORFEITURE.

(See ATTORNEY'S, 460; FEE, 412.)

HAWKINS TAYLOR COMMISSION.

(See SERVICE, 270.)

IDENTITY.

The record shows that John Clark was enrolled as a substitute for one William H. Converse, February 11, 1863, and was discharged November 11, 1863, by reason of the expiration of his term of enlistment. The testimony of persons who knew claimant and met him in the service where he was serving under the name of John Clark; of his sisters who corresponded with him under the name of John Clark, of Company D, Sixteenth Michigan Volunteers; the testimony of William H. Converse, and descriptive list of said Clark, as to his personal description, show that the claimant is the identical John Clark who served in said company and regiment, notwithstanding the fact that he denies that he enlisted as a substitute.

John H. Thompson, alias John Clark..... 33

IMPEDIMENT.

(See MARRIAGE AND DIVORCE, 15, 162, 179, 192, 211, 220, 254, 446.)

INCREASE.

(See also COMMENCEMENT, 66; FEE, 412.)

Act of January 5, 1893.

It appearing that this pensioner has a life estate in and the use and benefit of 15 acres of good farming land, upon which he resides, and personal property worth from \$90 to \$100, from which he derives an annual income of about \$75, he can not be held to be "in such destitute circumstances" that the pension of \$8 per month he is now receiving under the provisions of the act of January 29, 1887, is "insufficient to provide him the necessaries of life."

John A. Hardy 64**Desertion.**

Pensioner is in receipt of pension at \$17 per month, for rheumatism and resulting disease of heart. This pension was granted when the rules of practice recognized his service as legal. Since then a change in said rules and in the construction of the law would not permit the allowance of said pension *de novo*, because the service is considered as nonpensionable, but under the "general instructions" in regard to practice in the Bureau, it is provided that the pension as granted shall not be disturbed as to title, but no additional pension, either as increase or for new disability, may be allowed. Hence this claim for increase of rating was rejected.

It is held, that while the "general instructions" are proper and sustained by former decisions as regards original title, yet as long as his name is kept on the rolls he is entitled to increase of rating upon a proper showing of increase of the disability for which pensioned. The rejection is accordingly overruled.

William Wilson 232**INCURRENCE.**

(See EVIDENCE, 92.)

INDIAN WARS.

(See SERVICE, 26.)

INFANTS.

(See MARRIAGE, 389.)

INSANE OR HELPLESS MINOR.**Act of June 27, 1890.**

Evidence shows that said child has been afflicted from birth by depression of breast bone upon the spine, displacing vital organs, and rendering him extremely nervous and weak to such an extent that he has been mentally and physically unable to care for or support himself. He can not perform effective or remunerative labor and is considered permanently helpless, in the contemplation of the proviso to the third section of the act of June 27, 1890, and entitled to a continuance of his pension after arriving at the age of 16 years.

Minor of Reuben Alden 22

Claimant is unable to perform any manual labor, can not bear his weight upon the right lower limb, has lateral curvature of the spine, his right arm is atrophied and wasted away, he is slightly idiotic, and is unable to dress and undress himself.

Held, That he is so permanently helpless, within the meaning of the third section of the act of June 27, 1890, as to be entitled to a continuance of his pension as a minor under the provisions of said act.

Elmer A. Rodkey 224

The evidence shows that the claimant, by reason of mental infirmity, is incapable of the intelligent pursuit of any vocation, or of obtaining remunerative employment.

Held, That she has a pensionable status as an insane or helpless minor under the act of June 27, 1890.

Minor of Philip J. Conklin..... 368

INSANE PERSONS.

Declarations.

Application on behalf of an insane sailor, without guardian, made by his wife, accepted as sufficient to constitute a "claim pending" at the date of his death.

Benjamin R. Mays..... 109

INSANITY.

(See MARRIAGE, 192.)

IOWA.

(See MARRIAGE, 182.)

JURISDICTION.

Notice—Decree.

The widow's claim was rejected on the ground that her husband obtained a divorce from her in the State of Colorado while she resided in Massachusetts. The transcript of the record fails to show affirmatively that a copy of the summons in the divorce proceedings was mailed to her, although her post-office address was known.

This statutory requirement being omitted, it is fatal to the jurisdiction of the court.

Emma M. Cooper (widow)..... 434

LAY TESTIMONY.

(See DEATH CAUSE, 453.)

LEGITIMACY.

(See MARRIAGE AND DIVORCE, 227; MARRIAGES OF SLAVES, 75.)

LIMITATION.

(See also FEE, 357.)

Fee—Attorneys.

Order No. 354 of the Commissioner of Pensions is prospective only. Title to fee which had accrued prior to the promulgation of said order can be properly asserted at any time within three years from the promulgation of said order.

Jacob Paul (Milo B. Stevens & Co., attorneys)..... 421

Section 4713, R. S.

The minor's application in this case was filed in 1899. The person on account of whose death the claim is filed died in 1815.

Held, That the claim is barred by the provisions of section 4713, Revised Statutes.

Section 4702, R. S.

Section 4702 of the Revised Statutes does not require that application by minor children for pension thereunder be made while they are under 16 years of age.

In claims where the children had attained the age of 16 years before July 1, 1880, but had not filed application for the pension prior to that date, it is recommended that a judicial decision of the question should be obtained in a test case for the future guidance of the Secretary of the Interior and the Commissioner of Pensions, and Congress has been requested to enact a law which would permit this to be done, and until further directions consideration of such claims will be withheld.

Instructions 465

LINE OF DUTY.

Engaged in Athletic Sports.

It appearing from the evidence that the injury to right shoulder, alleged as basis for additional pension, was incurred by this pensioner while in camp engaged in athletic sports, and was not the result of any wrongful or improper conduct on his part, nor in violation of any rule or regulation of the military service, nor in disobedience of orders from his superior officers, it was error to hold that it had not been received in line of duty (Henry Newman, 8 P. D., 532.)

Lindley Ruddick 217

Poison, by Wood Alcohol.

Appellant is shown to have become totally blind in both eyes while in the service. Blindness developed soon after the ingestion of a poisonous quantity of wood alcohol. At the same time the soldier was convalescing from pneumonia, which was complicated by malarial fever.

The evidence on file warrants the conclusion that the total loss of vision in this case was due to wood-alcohol poisoning, and not to malarial poisoning, as alleged.

Joseph E. Hendrickson 376

Provost Marshal.

In the case of a provost-marshal, deputy provost-marshal, or enrolling officer, wounded or injured during the period in which he held such office, there is no presumption that such wound or injury was received while such officer was in the discharge of his duty, but it must be proved that such officer incurred his disability in the actual discharge of his duty as such officer.

Minor of James Hayne 345

Undergoing Punishment.

As soldier's death cause was contracted while he was under arrest and confinement under sentence of a court-martial on a charge of exciting mutiny, his widow is not pensionable for the reason that said death cause was not incurred in the line of duty.

Sarah J. Hawkins (widow) 370

LOUISIANA AND MISSISSIPPI.

(See MARRIAGE, 393.)

MARRIAGE.

(See also EVIDENCE, 51.,

Adulterous Cohabitation.

The evidence shows that the soldier left surviving him a widow and minor children. His mother, therefore, has no pensionable status, notwithstanding the fact that the widow was denied a pension on the ground of her adulterous cohabitation.

Eliza A. Daniels 153

Colored and Indian Soldiers.

A claimant, as widow of a colored soldier, is pensionable under the general law, and is entitled to his accrued pension, upon proving her marriage, as prescribed in section 4705, Revised Statutes; but in order to be pensionable under the act of June 27, 1890, she must prove a marriage which is valid under the laws of the place where they resided at the time of marriage or when the right to pension accrued.

A slave marriage in Kentucky is not valid unless declared in conformity with the act of February 14, 1866, of the legislature of that State.

Maria Merritt 157

Consanguinity.

A marriage between an uncle and his niece is valid in the State of New York. The marriage in the State of New York of a female under 13 years of age is valid, though voidable; but can not be avoided if she cohabits with her husband after she becomes of the age of legal consent.

Abbie Salmon (alleged widow) 389

Decree of Nullity.

Claimant was pensioned up to January 4, 1870, when she was remarried to one Patton, and the pension was then continued to the minor children until they became 16 years of age. In 1890 she applied to be restored to the rolls, claiming that her marriage to Patton was void because at the time he had a former wife living from whom he had not been divorced, and to sustain said allegation filed a decree of a court, in an ex parte proceeding, nullifying said marriage.

Held, That as the Government was not a party to said nullity proceedings, and as it is shown that said decree was procured by fraud, it is not bound by said decree; and as the other evidence filed to show the invalidity of said marriage is insufficient to show that Patton was previously married, claimant's marriage to him must be held to be valid.

Mary J. Faughn (as widow) 284

Claimant, at the time she married the soldier, had a former husband living, from whom she had not been divorced. Subsequent to the death of her second husband—the soldier—she procured a decree in the supreme court of New York annulling said first marriage on the ground that claimant had not attained the age of legal consent at the time said marriage was consummated.

Held, That under the laws of New York, and by the terms of said decree, such decree became effective only from the date thereof; and it appearing from the evidence that claimant and her first husband cohabited as husband and wife after she had arrived at the age of legal consent, she was his legal wife at the time she married the soldier and remained such up to the date of the decree of nullity before mentioned, and therefore was never the legal wife of the soldier, and is not his lawful widow.

Sally A. Fuller (alleged widow) 238

Evidence.

Claimant maintained an illicit relation with one Henry Davis, from about 1869 to 1882, in the States of Illinois and Missouri, when they separated and both married thereafter, Davis marrying in Sedalia, Mo., in 1884, and claimant marrying soldier in 1885, by a ceremony, with whom she lived as his wife until his death in 1891. Claimant and Davis both swear that they were never married to each other, and the evidence does not show that they were ever regarded as husband and wife in the communities where they lived.

Held, That the cohabitation of claimant and Davis was illicit and not matrimonial, and that her marriage to the soldier was valid.

Sarah Newberry (widow) 294

Claimant first stated that she was previously married to one Neil in the Isle of Man, England, by whom she had one child, a daughter, and that her said husband was dead. Evidence taken on special examination shows claimant's maiden name to have been Neil, and that her daughter was the fruit of an illicit relation with a man in England, and claimant now admits this, claiming that she had represented herself as a widow to conceal from said daughter that she was an illegitimate child, and it is held that there was no impediment to her marriage to the soldier.

Mary Ann Jones (widow) 297

1. Under the Maryland decisions the same proof of cohabitation, general reputation, and acknowledgment that will establish a marriage good at common law will establish the presumption of a religious ceremonial marriage in that State. Richardson v. Smith (80 Md., 89); Redgrave v. Redgrave (38 Md., 97);

Jackson v. Jackson (80 Md., 176); S. C. (82 Md., 17); Barnum v. Barnum (42 Md., 251); and Jones v. Jones (48 Md., 391).

2. The evidence in this case fairly establishes a valid marriage of the claimant and soldier under the laws of Maryland, even assuming the decision of the supreme court of that State in the case of Denison v. Denison (35 Md., 361) to be a correct construction of the Maryland statutes.

Rebecca Wiley (widow) 304

A divorce is never presumed, except it be for the purpose of upholding a subsequent marriage, such marriage having been proved to be an established fact.

The mere fact that one lived with another man or woman in a marital state, or that there was a subsequent ceremonial marriage, is not sufficient to warrant a presumption of divorce. There must be other substantial facts in connection therewith before such a presumption can be successfully invoked.

Anna Maria Gallich 311

1. Where a claimant for pension, in order to sustain the legality of her marriage to the soldier, alleges that said soldier procured a divorce from a former wife (who also claims pension as his widow) in a certain county and State, she must prove such divorce by the records of the proper court in said county.
2. There could be no stronger presumption in favor of a second ceremonial marriage than there would be in favor of the validity and continuance of the first ceremonial marriage.

Mary C. Orr (alleged widow) 348

It appearing from the evidence that the deceased soldier had been lawfully married to another woman prior to his marriage to this appellant, and that said first wife is still living, and there being no sufficient evidence that said first marriage was ever legally dissolved by divorce, this appellant can not be recognized as the widow of the soldier, and is not entitled, under the proof in this case, to pension as such widow under the provisions of section 4702, Revised Statutes.

Kate E. Richardson (as widow) 409

The only evidence of a prior marriage of this sailor being his own statement, in which he says also that he was divorced from such marriage before, and was a widower at the time of his formal remarriage to claimant, with whom he lived for twenty-five years thereafter until his death, such remarriage is held to have been a valid one, and claimant his lawful widow, notwithstanding there is no corroborative evidence of such divorce from the prior marriage, or of the first wife's death.

Sarah Buchanan (widow) 423

It is only when a party relies upon a valid marriage ceremony that, under the Maryland decisions, the same proof of cohabitation, general reputation, and acknowledgment which will establish a marriage good at common law will establish the presumption of a religious ceremonial marriage in that State.

Mollie Purnell (widow) 431

Fraud.

- Claimant alleges that she was married to the soldier, John Quinn, at Vincennes, Ind., November 20, 1867, under her maiden name of Elizabeth Ryan, and relies entirely for proof of that fact on a certified transcript of the marriage records of the county in which Vincennes is situated, showing the marriage of one John Quinn to "Eliza Frederick" on the date alleged. It is conclusively proved that said marriage record referred to entirely different persons than alleged by claimant, and that the minors of John Quinn, of Company F, Twenty-fourth Indiana Volunteers, the person to whom said record refers, have filed a copy of the same record to prove the marriage of their deceased father to their mother, Eliza Frederick; therefore, claimant having failed to prove her marriage to soldier, can not be regarded as his lawful widow.

Elizabeth Acton (alleged widow of John Quinn) 258

Emancipation.

It being material to a proper determination of the question as to the validity of the claimant's marriage to the sailor to know whether the latter died before or after slaves were emancipated by the adoption of the thirteenth amendment to the Constitution, and the evidence on that point being conflicting, the action is set aside and the case remanded for further inquiry—by special examination if necessary.

Marie L. Boss (alleged widow) 36

Impediment.

A marriage solemnized in the State of Virginia, when either of the parties had been previously married, said first marriage never having been dissolved, is void from inception. It necessarily follows that when the impediment is removed a new relation must be shown to have been entered into; for a continuance of cohabitation is but a continuance of an illicit relation upon which a common-law marriage can not be based. (*Stones v. Keeling*, 5 Call., 143, and *Herbert v. Hile's Admr.*, 90 Va., 390.)

Indiana Christie (alleged widow) 15

1. Claimant's husband, Matthew Lambert, deserted her, and she thereafter was married by ceremony to John Conroy, in the State of Pennsylvania. There are no facts other than desertion on which to found a presumption of death.

Held, Claimant is not the widow of John Conroy. (*Sarah C. Hayden*, 8 P. D., 364; *Helen L. Pepper*, 9 P. D., 500.)

2. Marriage, in pension cases, is to be proven under section 2, act of August 7, 1882, and this Department will be generally guided, though not absolutely bound, by the construction placed upon the laws of a State by their courts of last resort, following the rule adopted by the United States Supreme Court.

3. Any statement in the opinion in the case of Margaret L. Thomas (9 P. D., 139) which conflicts with said rule is hereby modified.

Catharine Conroy (alleged widow) 162

The evidence shows the claimant's marriage to the soldier was invalid, he having at that time a former wife living and undivorced.

Sarah F. Sullivan, now Morris (widow) 179

Soldier married claimant by ceremony in 1864, when he had former wife living, who was divorced from him twenty-three months thereafter. Claimant and soldier lived together as husband and wife, and were so recognized by their neighbors and relatives, for twenty-six years after the removal of the impediment to their marriage, and up to the date of soldier's death.

Held, That under the laws of the State of Ohio, where the parties resided, a common-law marriage contracted after the removal of said impediment will be presumed. (*Bremer v. Briggs*, 32 Ohio Sta., 378, and *Swartz v. State*, 33 Ohio C. C. Rep., 62.)

Fredricka Kent (widow) 211

At the date of claimant's alleged marriage to soldier, in 1865, in the State of New York, she had a former husband living from whom she had not been divorced. She continued to live and cohabit with soldier in the States of New York, Minnesota, and Michigan from 1865 up to the date of his death, in 1893. Her first husband died in 1866. On September 27, 1891, a marriage ceremony was performed between the claimant and soldier in the State of Michigan.

Held, That as claimant's relation with soldier was illicit in its commencement, it is so presumed to continue until a changed relation is proved, and actual marriage can not be presumed from continued cohabitation and reputation after the removal of the legal impediment by the death of her first husband. *Rose v. Rose* (67 Mich., 619), *Ellen A. Palmer* (7 P. D., 363), *Louisa S. Hoepfner* (9 P. D., 497), *Wilhelmina K. Monteton* (10 P. D., 12); and *Indiana Christie* (*ibid.*, 15).

Harriet Comstock (alleged widow) 220

The mere fact that Yates was a "widower" when he married claimant is assumed by the Bureau of Pensions to be sufficient ground on which to compel claimant to furnish positive evidence of the death or divorce of the former wife.

Held, Claimant having shown a ceremonial marriage, and there not being the shadow of a suspicion (beyond the fact that the officer was a widower) that claimant's marriage was not a lawful one, the burden of proof is upon the Government to show the illegality of such marriage. (Stewart on M. and D., Chap. XVIII.)

Lizzie Yates (widow) 446

As soldier was incapable of entering into a marriage relation by reason of insanity, the claimant's marriage to him is void, and therefore action rejecting her claims for pension upon the ground indicated was proper.

Mary J. Storms (widow) 192

Legitimacy.

Only the minor children of a colored soldier by the woman with whom he lived in the relation of husband and wife up to the date of his enlistment, or to the date of his death if he died subsequent to his service, are entitled to a minor's pension under section 4705, Revised Statutes.

Minors of William Toller 75

1. A common-law marriage is good in the State of Wisconsin. A marriage in Wisconsin when one of the parties has an undivorced living husband or wife is void. After such impediment is removed a new relation must be shown to have been entered into as a fact; otherwise the continuance of the cohabitation will be presumed to be illicit. (Williams v. Williams, 46 Wis., 464.)
2. Children born of a marriage null in law are legitimate in Wisconsin. (Sec. 2274, R. S. Wis., and Warts et al. v. Owen, 62 Wis., 512.)
3. Such fact does not, however, give them a pensionable status, for a pensionable status is to be determined wholly by the laws of the United States, which limits a minor's title to one which was, or could have been, in the legal wife (widow). (Sec. 4702, R. S. U. S., as amended.)

Alleged minors of Jonas W. Pulver 227

Minors' pension.

1. It appearing that the last marriage of this appellant, Mary E. Resser, to the deceased soldier was subsequent to the passage of the act of June 27, 1890, she has no title whatever to pension as his widow, under the express provisions of the third section of said act.
2. It also appearing that the widow of said deceased soldier is still living and unmarried, his minor children have no title to pension under the provisions of said section. (Minor child of Lafayette Howard, 9 P. D., 230; minors of John Davis, 9 P. D., 151.)

Minors of Charles W. Resser 266

Nunc pro tunc decree.

Claimant and soldier were married on the 29th day of May, 1881. Claimant was divorced from her husband April 8, 1881. Soldier had been previously married, but in a proceeding for a divorce from his former wife the records of the circuit court of Cook County, Ill., show that on the 28th day of May, 1881, the case was heard by the judge of said court, and a decree of divorce ordered, and a formal decree was spread upon the records; it further appears that soldier's attorney in said suit subsequently informed him that a final decree could not be entered until soldier paid the stenographer for transcribing his notes of the evidence taken in said suit and a balance due said attorney; said soldier paid said charges, whereupon said attorney presented, on July 14, 1881, to the judge of said court a decree in nearly the identical language as the decree formerly spread on the records of said court, which said judge signed, and the same was also spread on the records. It is

Held, That said soldier was legally divorced from his former wife on the day said cause was tried and determined, and not on the date of entering said subsequent decree, and that his marriage to claimant was valid.

Isabel W. Siler (widow) 1

Slaves—Impediment.

Claimant was pensioned as the widow of the soldier who died in the service, but her name was dropped from the rolls upon her remarriage by a ceremony with one Smith, alias Lyons. She now claims a continuance of pension on the ground that said Smith had a wife living at the time of his marriage to her. The evidence shows that Smith had a slave wife living with whom he had not lived for some years prior to his marriage to claimant, but having married claimant according to the forms of law, this former relation with Annie Parker had no legal effect on his marriage with claimant, and she was therefore his legal wife.

Amanda Fane (now Smith, as widow) 254

At the date of the alleged marriage of claimant to the mother of soldier in the State of Missouri both were slaves, and so continued up to the day of the mother's death in 1858.

Under the decision of the Supreme Court, in the case of *Johnson v. Johnson* (45 Mo., 595), their alleged marriage was void.

Garrison Pennoyer (alleged father) 362

The appellant and the deceased soldier were colored persons residing in the State of Kentucky, and had been married while in a state of slavery in the year 1852, in accordance with the custom of slaves, but after their emancipation had taken no steps to ratify and legalize their subsisting slave marriage in the manner required by the statutes of that State.

Held, That the appellant can not be recognized as the widow of the soldier and is not entitled to pension under the provisions of the third section of the act of June 27, 1890. See decisions in cases of *Nannie Roach* (7 P. D., 86) and *Lettie Hawkins* (8 P. D., 22).

Mary Riddle (widow) 441

Widow's pension act, March 19, 1886.

As claimant was married to soldier subsequent to the passage of the act of March 19, 1886, viz, on September 4, 1891, the allowance of the rate of \$8 was proper. The fact that appellant had a meretricious relation with the soldier prior to the passage of said act does not entitle her to the rate of \$12 per month.

Wilhelmina K. Monteton (widow) 12

District of Columbia.

1. A statute regulating the forms of marriage is merely directory, and unless it contains an express clause of nullity a marriage valid at common law is valid under such a statute.
2. The statutes in force in the District of Columbia contain no express clause of nullity, and a marriage valid at common law is valid in the District of Columbia.
3. A marriage valid at common law is valid in the State of Iowa. See case of *Annie Dennis* (9 P. D., 243).

Maria McCarthy (widow) 118

1. A marriage per verba de presenti was valid at common law, and is valid within the District of Columbia. (*Thomas v. Holtzman*, 18 D. C., 62; *Meister v. Moore*, 96 U. S., 76.)

Henry Higgins (deceased). Annie Higgins (widow) 110

Tennessee and Missouri.

1. The evidence in this case fails to show any ceremonial or common-law marriage between the claimant and soldier, but shows that their relation was illicit in its inception, and continued unchanged until her desertion of soldier in 1885, eight years prior to his death.

2. A relation illicit in its origin is presumed to so continue until a changed relation is shown, and continuous cohabitation of the parties after the removal of the legal impediment to marriage is not evidence of a change from an illicit to a matrimonial status under the laws of Tennessee or Missouri.

Angeline Adamsdn (alleged widow) 328

Louisiana and Mississippi.

The evidence shows that at the time of claimant's marriage to the sailor he had a lawful wife living and undivorced, so that the marriage was void ab initio. This is not only the general rule of law but is in accord with the decisions of the courts, especially in Louisiana and Mississippi, where these parties lived. And there is no evidence to show that a new contract of marriage or other form of consent was entered into after the removal of the impediment—that is, the death of the first wife, which was five months before sailor's death. Marriage can not be presumed, and rejection of claim was proper.

Louisa C. Germain (widow) 393

MARYLAND.

(See MARRIAGE, 431.)

MATERIAL SERVICE.

(See FEE, 144.)

MEDICAL EXAMINATIONS.

(See DISABILITY, 276; PRACTICE, 271.)

MEDICAL REFEREE.

(See PATHOLOGICAL SEQUENCE, 52.)

MEXICAN WAR.

(See SERVICE, 139.)

MILITARY AGE.

(See DESERTION, 355.)

MINOR'S PENSION.

(See also MARRIAGE AND DIVORCE, 266.)

June 27, 1890.

Where the applicant is claiming as the minor child of soldier by a former wife, deceased, contending that the surviving widow has never been charged with care and maintenance of the claimant, the rejection of the claim on the ground that the soldier left a surviving widow who is unmarried is not responsive to the question presented, nor determinative of claimant's right.

Minor of Allen Biggers 124

Section 4702, R. S.

Section 4702 of the Revised Statutes does not require that application by minor children for pension thereunder be made while they are under 16 years of age.

In claims where the children had attained the age of 16 years before July 1, 1880, but had not filed application for the pension prior to that date, it is recommended that a judicial decision of the question should be obtained in a test case for the future guidance of the Secretary of the Interior and the Commissioner of Pensions, and Congress has been requested to enact a law which would permit this to be done, and until further directions consideration of such claims will be withheld.

Instructions 465

MISSOURI.

(See MARRIAGE, 328.)

MISSOURI MILITIA.

(See SERVICE, 8, 19, 270.)

MUSTER OUT TO ACCEPT NEW COMMISSION.

(See SERVICE, 188.)

NEGLIGENCE.

Soldier, an epileptic and a carpenter, went upon the roof of a building without any other motive than a desire to pursue his usual vocation, was seized by an epileptic fit, fell to the ground, and was killed by the fall. He was well aware of his epileptic condition, having been subject to seizures once or twice a week for some time previous.

Held, If the death of a soldier is shown to be due to his own negligence, the fact that the pensioned cause was present as a factor in said death is subservient to the greater and proximate factor of the negligence of soldier. Negligence, not epilepsy, was the proximate cause of death. (Balto., etc., R. Co. v. James, 95 U. S., 439; La. Mut. Ins. Co. v. Tweed, 7 Wall., 52; Mil. Rwy. Co. v. Kellogg, 94 U. S., 474; Margaret Moran, 9 P. D., 492.)

Sarah H. Monty (widow) 101

NEW DISABILITY.

(See EVIDENCE, 46.)

NOTICE.

(See ELECTION, 61; JURISDICTION, 434.)

NUNC PRO TUNC DECREE.

(See MARRIAGE AND DIVORCE, 1.)

PATHOLOGICAL SEQUENCE.

(See also DEATH CAUSE, 202.)

Neither paralysis agitans nor cerebro-spinal sclerosis can be accepted as a pathological sequence of chronic diarrhea or any sequelæ thereof.

George B. Cook 39

Generally, where an attending physician appears to be in good standing his diagnosis of the patient's disease is accepted as correct; but when it comes to a question whether one disease resulted from another the ipse dixit of such attending physician is not received unless in accord with the generally accepted teachings of medical science (as to which the Department will be advised by the medical referee) or unless it derives some peculiar and extraordinary value from such physician's professional standing and experience.

Sarah J. May (widow) 52

PAYMENT.

(See also ATTORNEYS, 403.)

Pensions being allowed under the general law and act of June 27, 1890, it was proper to adjust the ratings so as to prevent overpayment, or double payment of the same pension, or the payment of both pensions for the same period of time, and such deductions and reissues as avoided this and preserved to pensioner the highest ratings to which he was adjudged entitled were not erroneous.

Joshua W. Mattick 281

PENDING CLAIM.(See **INSANE PERSONS**, 109.)**PILOT.**(See **SERVICE**, 182.)**POISON.**(See **LINE OF DUTY**, 376.)**PRACTICE.**(See also **APPEALS**, 374; **ELECTIONS**, 61; **FEE**, 167; **RATES AND RATING**, 185, 397, 414.)**Attorneys.**

The relations between attorney and client, in a pension claim, are not such as to give the attorney all of the same rights that he would have under the common law.

The mission of, and the procedure under, a special examination is such as to preclude the absolute necessity of the presence of an attorney to protect either his own or his claimant's rights. The prevailing practice of allowing an attorney to be present, and to take part in a special examination, if so requested by claimant, is all that is necessary under the circumstances, for the Government is not in any wise a defendant in such proceedings.

Ascha Hughes (mother) 390

Commencement.

"Whenever a claim for pension under the act of June 27, 1890, has been, or shall hereafter be, rejected, suspended, or dismissed, and a new application shall have been, or shall hereafter be, allowed in such claim, such pension shall date from the time of the filing of the first application, provided the evidence in the case shall show a pensionable disability to have existed, or to exist, at the time of filing such first application," whether claimant has invoked the aid of the act of March 6, 1896, or not.

Preston M. Rohn 73

Declarations.

It is held that the Bureau erred in treating a declaration which did not specify under what law it was filed as a declaration under the general law without explaining to the claimant the benefit of applying under the act of June 27, 1890, and giving her an opportunity to intelligently amend her declaration.

Eliza R. Mong (mother) 78

Dismissal.

The filing of a second application for pension under the act of June 27, 1890, while an appeal from the rejection of a former application is pending, is not a good ground for dismissing the appeal unless the applicant expressly or implicitly asks to have the first application reconsidered.

Medical examination under the first application showed no disability except a slight affection of the heart, and that was not found at a subsequent examination. Age, 57 years; height, 5 feet 10½ inches; weight, 165 pounds.

Held, That a pensionable disability did not exist at the date of filing the first application.

Charles A. Sampson 458

Rates.

1. Rule 6 of the second division of the rules of practice was never intended to apply except in cases of such errors of rating as were patent upon their face, and which would naturally be corrected by the Commissioner of Pensions upon his attention being called to such errors; but where the determination of a rate is the result of judgment on the evidence, and not merely the result of a clerical mistake, the rule has no application.

Chauncey Davis 12

Reopening.

Where, under the general law, claim for pension is made on account of general debility, a medical examination is held which discloses no cause of disability, and thereupon the claim is rejected, the fact that a condition of general debility is shown to exist subsequently does not warrant action reopening the claim.

Andrew G. Clark 271

The refusal to consider the widow's application for readjudication of her husband's claim in accordance with the provisions of the act of March 6, 1896, on the ground that he (the husband) had no claim for readjudication on file at the date of his death, was error.

A rejected claim may be reopened at any time, upon the filing of proper evidence for that purpose, either by the original claimant or by the person who succeeds to his rights.

William Heinrichs 321

PREDISPOSING CAUSE.

(See DEATH CAUSE, 90.)

PRESUMPTION OF DEATH.

(See EVIDENCE, 51; MARRIAGE AND DIVORCE, 162.)

PRIOR SOUNDNESS.

(See EVIDENCE, 448.)

PROVOST-MARSHALS.

(See LINE OF DUTY, 345.)

RANK.

(See FEE, 428; RATE, 299.)

RATE.

(See also AID AND ATTENDANCE, 172; PRACTICE, 12, 13.)

June 27, 1890.

As the medical examinations show no appreciable disability, a rate of \$6 per month is adequate under the act of June 27, 1890, though claimant is 60 years of age and his system is relaxing by reason thereof.

Chauncey Davis 13

The evidence on file at the time the pension was reduced showing that the pensioner could earn a partial support by manual labor, the reduction from \$12 to \$8 per month is held not to have been erroneous.

Evlin Earl 176

It was not intended by the second section of the act of June 27, 1890, to grant pension thereunder for a degree of disability that would not materially impair a claimant's ability to earn a support by manual labor.

Reuben F. Scott 256

1. Pensions under section 2 of the act of June 27, 1890, can not be rated as under sections 4692 and 4693 R. S., or the act of August 27, 1888.

2. To be ratable under the second section of the act of June 27, 1890, a disability must not only be of a permanent character, not the result of claimant's vicious habits, but must incapacitate him for the performance of manual labor, and that in a degree rendering him unable to earn a support.

3. Total deafness of one ear only is not a pensionable condition under said act.

Charles Norbury, alias William Walker 261

Pensions for dependent parents are rated in accordance with the provisions of section 4707 of the Revised Statutes as amended by the act of March 19, 1886, the first section of the act of June 27, 1890, only amending said section to the extent of requiring claimants to prove present dependence instead of dependence at the date of the son's death.

Elizabeth Darling (mother) 299

Appellant filed his first claim for pension under the act of June 27, 1890, on September 24, 1891. Said claim was rejected October 30, 1894, on the ground of no disability shown under the act. Certificate of medical examination made under the claim showed existence of an inguinal hernia, incomplete. A second claim was filed June 23, 1897, under said act, together with a claim under the provisions of the act of March 6, 1896. Pension was allowed for an inguinal hernia from date of filing last declaration, and former rejection was adhered to by the Bureau on the ground that a schedule of rates prepared for general law pensioners fixed a rate of only \$4 per month for a like condition during a period prior to December 4, 1891.

Held, That in fixing rates of pension in claims under the act of June 27, 1890, only the degree of inability for earning a support by manual labor should be considered, other laws and schedules not being allowed to influence the action.

Isaac B. Childers 397

Any practice which allows a rating under the act of June 27, 1890, without making the degree of inability to earn a support by manual labor the basis of judgment, is unwarranted by law. (*Isaac B. Childers*, 358 L. B., p. 396.)

A pensionable condition can not be found because designated by a name of a disease or disability, unless such name or designation carries with it the conclusive fact that it embraces conditions which are of necessity of such a character as to pensionably disable one.

Neither the term "complete inguinal hernia" nor "incomplete inguinal hernia," per se, conveys any specific information by reason of which a rating could be allowed.

Lucius S. Hollis 414

Compounding rates.

Unless specifically provided for, there is no provision of law by which disabilities can be considered separately and compounded so as to allow for all the pension which each, considered separately, would aggregate. It is the combined effect of all that must be considered; and in this case the combined effect of all the disabling causes accepted as due to the service not rendering claimant's incapacity to perform manual labor equivalent to the loss of a hand or a foot, he is not entitled to a higher rate of pension than he now enjoys (\$17 per month).

George A. South 21

Pensioner was receiving a rating of seventeen-eightieths for neuralgia and slight deafness of both ears, result of catarrh, said rating being made up of two-eightieths for the first-named disability and fifteen-thirtieths (the schedule rate at time of allowance) for the deafness in that degree. Afterwards, when rating of four-eightieths was allowed for additional disability from chronic diarrhea and piles, the total rating was continued at seventeen-eightieths, because the ratings could not be combined to make twenty-one-eightieths, a rate unknown to the law. Then again, the schedule rate for slight deafness of both ears has been reduced to six-thirtieths. This was recommended in the last certificate of examination, together with six-eightieths for piles and disease of rectum, result of diarrhea, and six-eightieths for pains in stomach, chest, and head, result of neuralgia. Thus, the combined rates making eighteen-eightieths, kept the total pension at the former rate of seventeen-eightieths per month.

The ratings named could not be combined to make the third-grade rate, or \$24 per month, even if they would amount to so much, and as they do not altogether, and considered as a whole, produce a degree of incapacity to perform manual labor equivalent to the loss of a hand or foot, pensioner is not entitled to said third-grade rate.

Mark Davis 185

First grade.

Unless a pensioner's name was borne upon the rolls at first-grade rate proper—\$50 per month—prior to the passage of the act of March 4, 1890, which act increased the said rate to \$72 per month, or the certificate of a medical examination made prior to the passage of the said act showed the existence of such a degree of disability as to warrant the allowance of the said first-grade rate, the terms of the act itself prohibit the allowance of the rate prescribed therein from any period prior to the date of the certificate of an examining surgeon or board of examining surgeons showing such degree of disability.

James Bennett 443

RATING.

(See CONSTRUCTION, 99; DISABILITY, 276; FEE, 428; PAYMENT OF PENSION, 281.)

RECOGNITION, ACT MARCH 3, 1899.

(See ATTORNEYS, 236, 403.)

RECORD.

(See DESERTION, 55; EVIDENCE, 80, 319.)

REFUNDMENT.

(See FEE, 150.)

REIMBURSEMENT.

(See also EVIDENCE, 448; FEE, 150.)

Pensioner having drawn two pensions for the same period of time, in contravention of the provisions of law, and the Bureau having taken steps to secure reimbursement of the amount illegally paid by withholding all pension until the overpayments are recovered, it is held that such action was proper; that it is a duty imposed by the law, and that the Department has no power to afford the pensioner relief by revoking the action or annulling the requirement of the statute.

Samuel B. Weeks 84

REMARRIAGE.

Dependent Mother.

The remarriage of a dependent mother prior to the act of June 27, 1890, is not a bar to pension under section 4707, as amended by the first section of said act, provided the facts required by the first section of the act are duly established. (Mary Kille, 7 P. D., 550.)

Elizabeth Darling (mother of Franklin Rickard) 244

Widow.

Claimant was pensioned as the widow of the soldier from July 16, 1890, to July 4, 1892; she remarried July 6, 1892.

Held, That her remarriage barred her further title to pension under the act of January 29, 1887, and that her name was properly dropped from the rolls.

Dora F. Otis (widow), now Corley 324

REOPENING.

(See PRACTICE, 271, 321.)

RERATING.

(See APPEALS, 250; RES JUDICATA, 249.)

RES ADJUDICATÆ.

(See also INCREASE, 232.)

Cases long since adjudicated by previous Administrations will not be disturbed for slight or trivial reasons, nor upon mere matter of opinion as to the weight of evidence, nor upon any matter involving merely an exercise of judgment or discretion, but only when glaring error, mistake, or manifest injustice is apparent from the record or the evidence.

See Birney Hoyt (1 P. D., 70); Isaac Sell (2 P. D., 172); Wallace G. Bone (2 P. D., 310); John Burnham (4 P. D., 93); Jackson Martin (7 P. D., 265); Mary E. Eastridge (8 P. D., 5); George W. Amos (*ibid.*, 271); James M. Marshall (*ibid.*, 395); James Duval (9 P. D., 218); William Wilson (10 P. D., 232).

Charles F. Borthwick, alias Franklin Brown..... 249

RESTORATION.**Increase.**

Claimant having been a pensioner under the act of June 27, 1890, at the rate of \$6 per month, his name was dropped from the roll under said act, and was placed on the roll under the general law. September 16, 1896, he filed a claim for renewal and increase under the act of June 27, 1890, which was allowed by reissue on October 7, 1897, at \$10 per month from date of filing—September 16, 1896.

Held, That this was error. As the claim was one for restoration his name should have been restored at the rate of \$6 instead of \$10, as increase can only commence from the date of the certificate of medical examination showing an increased disability under section 4698½, Revised Statutes.

George Baltzer 37

REVENUE CUTTERS.

(See SERVICE, 401.)

SECTIONS 4704, 4705, 4707, AND 4723, REVISED STATUTES.

(See DEPENDENT RELATIVES, 104.)

SECTION 4705.

(See MARRIAGES OF SLAVES, 75.)

SECTION 4713, REVISED STATUTES.

(See LIMITATION, 417.)

SECTION 4715, REVISED STATUTES.

(See PAYMENT OF PENSION, 281; REIMBURSEMENT, 84.)

SECTION 4716, R. S., AND ACT JUNE 27, 1890.

(See DISLOYALTY, 86, 125.)

SERVICE.

(See DISCHARGE, 14; IDENTITY, 33.)

Act March 25, 1862.

This officer was appointed a captain in the Engineer Corps of United States Volunteers. He served more than ninety days in that capacity during the war of the rebellion, received payment therefor, and was honorably discharged from said service.

Held, That he comes within the provisions of the act of June 27, 1890, and is entitled to pension thereunder.

In re Radwich 58

Act January 29, 1887.

A soldier who enlisted in the Regular Army April 7, 1848, and assigned to a battery which left Fort Columbus, N. Y., for Vera Cruz, Mexico, May 11, 1848, where he arrived May 31, 1848, one day after the termination of the war, and was ordered from Vera Cruz to New Orleans June 4, 1848, where he arrived June 17, 1848, and thence to Governors Island, N. Y., July 15, 1848, did not actually serve sixty days in Mexico, or on the coasts or frontier thereof, or en route thereto, and his widow is not entitled to a pension under the act of January 29, 1887. Case distinguished from that of Elizabeth Young (9 P. D., 44).

Lany Bouday (widow) 139

It appearing from the official record of the military service of the deceased soldier during the Mexican war that he was not in the military service of the United States for sixty days during said war, and did not serve sixty days with the Army of the United States in Mexico, or on the coasts or frontier thereof, or en route thereto during said war, this appellant has no title to pension as his widow under the provisions of the act of January 29, 1887.

Mary F. Morrison (widow) 425

Act June 27, 1890.

Claimant's enlistment being on January 9, 1866, it is incumbent upon him to prove, before he can be accorded a status under the act of June 27, 1890, that his service was in aiding the suppression of the forces of the Confederate army or navy. (Following the holdings in the cases of John Barleyoung, 7 P. D., 453, and Edward Farrell et al., 7 P. D., 532.)

Charles McQuay 18

Civilian employees.

An acting assistant or contract surgeon is not pensionable under section 2 of the act of June 27, 1890.

Harvey E. Bowles 133

1. Service as pilot does not bring a claimant within the class of persons entitled to pension under the provisions of section 2 of the act of June 27, 1890.
2. The words "all persons" in said section are limited by the context to those persons "who served ninety days or more in the military or naval service of the United States during the late war of the rebellion and who have been honorably discharged therefrom," and do not include a person who served in the capacity of a civilian employee or nonenlisted person.

See cases of Angelina Coney (7 P. D., 390); Anna M. Whalan (9 P. D., 346); John Laughlin (*ibid.*, 466); Henry N. Haynie (*ibid.*, 304).

John H. Meeker 182

1. The legal status of a man who becomes a voluntary substitute for a soldier, and serves and is discharged in the name of the soldier, is that of a civilian, as he was never enlisted or mustered into the military service of the United States. (Christian, alias Ernest, Ulrich, 4 P. D., 411; Henry Bell, 5 P. D., 196, and Mary Brady, 9 P. D., 305.)
2. A civilian who served with the Army or Navy has no pensionable status under section 2 of the act of June 28, 1890. (John Laughlin, 9 P. D., 466.)

3. The time lost by desertion, where the deserter returned to his organization and was pardoned under the President's proclamation of March 11, 1865 (13 Stat. L., 752), is excluded in estimating the length of service required under section 2 of the act of June 27, 1890.
4. The evidence in this case shows that claimant is entitled to a credit of but one month and six days' service in the late war of the rebellion, under the act of June 27, 1890, which requires ninety days' service to entitle a soldier to a pension.

John S. Williams 169

Indian Wars.

Under the act of July 27, 1892, service rendered in the Black Hawk war, the Creek war, the Cherokee disturbance, or the Florida war with the Seminole Indians must be rendered in one of the wars therein expressly named. No other or different military service, even though rendered in the United States Army during the period named in said act, would be a pensionable service.

Elizabeth W. Wood (widow) 26

Missouri.

The organization in which the claimant served was a purely State organization, which does not come within the terms of the joint resolution approved February 15, 1895, and whose members are not entitled to pension under either the act of June 27, 1890, or section 4722 of the Revised Statutes.

Frederick Brennecke 19

The report of the Hawkins-Taylor Commission shows an actual military service rendered to the United States by the claimant of only forty-five days.

The report from the adjutant-general of Missouri, showing an interval of one hundred and two days between date of enrollment and date of disbandment of company, is not competent evidence as to the "actual military service rendered the United States," and no other service can be taken into account in considering claims to pension under the act of June 27, 1890.

Francis M. Davis 270

Claimant's husband was a member of the Missouri six months' militia, which organization was never in the United States service, and she has, therefore, no pensionable status under the act of June 27, 1890.

Martha Patterson (widow) 8

Muster out to receive commission.

The claimant's husband having been discharged from the service as surgeon of the Second Ohio Cavalry for the purpose of enabling him to accept an appointment from the governor of Ohio as surgeon of the Eighty-ninth Ohio Infantry, and having been drowned while on his way to join the latter regiment and before being mustered in, it is held that he was not in the military service of the United States at the time of his death and that his widow is not entitled to pension under existing laws.

Helen A. M. Taylor (widow) 188

Revenue Cutters.

The claimant served on board the revenue cutter Joe Lane, which was under orders of the President to cooperate with the Navy, but it does not appear that said vessel was ever in actual cooperation therewith.

Daniel M. Means 401

SLAVES.

(See MARRIAGE AND DIVORCE, 254.)

SPECIAL ACT.

(See CONSTRUCTION, 99.)

SPECIAL EXAMINATIONS.

(See PRACTICE, 390.)

STARE DECISIS.

(See RES JUDICATA, 249.)

SUBSTITUTION.

(See ATTORNEYSHIP, 143.)

SUFFICIENCY.

(See EVIDENCE, 92, 289.)

SUFFICIENT AVERMENTS.

(See DECLARATIONS, 359.)

TENNESSEE.

(See MARRIAGE, 328.)

TWO CLAIMS AND TWO FEES.

(See FEE, 198.)

UNDERGOING PUNISHMENT.

(See LINE OF DUTY, 37.)

WIDOWS.

(See DEPENDENCE, 326; DEPENDENCE ACT, JUNE 27, 1890, 9; REMARRIAGE, 324.)

WIDOW'S PENSION.

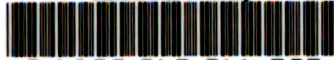
(See MARRIAGE, 12.)

WOOD ALCOHOL.

(See LINE OF DUTY, 376.)

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